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CURRENT EVENTS.

THE AGE OF CRIMINAL RESPONSIBILITY.—We have observed in several newspapers comments on a recent case tried in South Carolina in which a colored girl eleven years old was convicted of the murder by poison of a white baby, of whom she was the nurse. Premitting all comment on the partizan and sectional remarks which the incident has evoked, and utterly eliminating the "color line," we would say that the criminal responsibility of "an infant eleven years old" is not, as a newspaper, which certainly ought to know better, seems to suppose, peculiar to the criminal code of South Carolina. On the contrary, it is in force in all common law countries. Nor is the case utterly without modern precedents; we read, some years ago, of a "boy murderer" in one of the New England States, who, we believe, found refuge from the gallows in a State prison.

The rule of the common law on this subject is well known; and, as far as we have observed, has not been anywhere materially modified. An infant under seven years of age, so far as capital crimes or felonies are concerned, is presumed by the law to be absolutely innocent, *doli incapax*, and this presumption is conclusive, no averment to the contrary being admissible. Between the ages of seven and fourteen years the presumption that the infant is *doli incapax*, still continues, but with this material modification, that averments to the contrary are admissible, and evidence may be received which tends to prove malice, precocity and design. To cases of this character is applied the ancient legal maxim, *malitia supplet aetatem*.¹ Infants over fourteen years of age, of course, as to liability for crime, stand upon the footing of adults.

We must presume that the court and jury in the case under consideration, acting under the solemnity of their oaths, did their duty, and we must say that we cannot conceive a more painful duty than that which the law

imposed upon them. We do not favor any further alleviation of the death penalty for crime. In most, if not all the States, it is now limited to premeditated murder in the first degree, as it is usually called, and that without reference to age or sex. Occasionally, it is true, a woman is hanged, but, as we all know, the penalty is only inflicted in cases of abnormal and excessive atrocity, but we do not remember to have observed for many years past any mention of a case in which the ultimate penalty of the law has been inflicted upon a person fairly entitled to be classed as an "infant."

The administration of the criminal law in this point of view is sufficiently flexible, the jury may, without undue strain of their consciences, elect between the more and the less severe modes of punishment, and at the last, and the worst, recommend to mercy, and their recommendation is rarely or never disregarded. And besides this, and irrespective of any favorable action by the jury, executive clemency may always be invoked with good hope of success in all cases in which it is really deserved.

We do not believe that as it has been suggested with reference to this case, and those of women who, by their crimes, have incurred liability to the death penalty, that the law should be so modified as to subject to that penalty only adults males duly convicted. There may possibly occur cases of such excessive atrocity as to authorize and require the infliction of the penalty upon women and even possibly, on so-called "infants," and it is well to hold that penalty over them *in terrorem*.

Finally, we think the South Carolina case is a very suitable one for the exercise of executive clemency to the extent of a commutation of the punishment from death to a long term of imprisonment.

CURIOUS WILLS.—Many pages have been written about the oddities to be found in testamentary papers. We observe floating about in the newspapers a case which we think worthy of chronicling. The facts, briefly stated, were these: John Hayden made his will bequeathing his estate, £17,000, to a trustee, with instructions to pay the interest to his sister, Mary Hayden, during her life;

¹ Bouv. Law Dict. 794.

after her death, to pay the interest to Edward Fleming during his life, provided he remained single, and upon his death or marriage, to pay the *corpus* of the estate to any niece or other female relative of Edward Fleming who might marry a man named John Hayden, of the county of Tipperary, who had been born and reared a Roman Catholic. The sister died soon after the death of the testator; Edward Fleming remained single and received the interest of the fund during his life. At his death, Mary Hayden, *nee* Fleming, claimed the fund, because, being a niece of Edward Fleming, she had married a man named John Hayden, of Tipperary county, who had been born and reared a Roman Catholic.

The case came up for adjudication, the contest being between her and the next of kin of the testator. The master reported that there were one hundred and thirty-seven female relatives of Edward Fleming, but that the claimant was the only one who had married a man from Tipperary named John Hayden, and who had been born and reared a Roman Catholic.

The court decided that the bequest of the *corpus* of the estate was void for uncertainty and remoteness, and that the next of kin of the testator were entitled to the fund.

We doubt very much the accuracy of this ruling, but will not argue it here, preferring to submit the question to such of our readers as may be disposed to investigate the law on the subject.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TELEGRAPH COMPANIES.—In a recent case¹ the supreme court of the United States decided a point of some interest relating to the powers of the States to control the operations of telegraph companies. The facts were that the State of Indiana enacted a law by which, among other things, the delivery of telegraphic messages received at, or sent from telegraph offices in that State, was regulated; that while that law was in operation Pendleton sent a telegram from Shelbyville, Ind., to Ottumwa, Iowa,

which was duly received at that place, but was *not* delivered in accordance with the rules prescribed by the Indiana statute. Thereupon Pendleton brought suit in Indiana against the telegraph company and recovered judgment for \$100, the statutory penalty. The case was taken to the Supreme Court of Indiana and thence by writ of error to the Supreme Court of the United States. That court decided in effect that whatever police powers a State may possess under which it can regulate the transmission and delivery of telegrams *wholly* within the State, its statutes are inoperative if the delivery of the telegram takes place out of that State; that to that extent the statute is an attempt to regulate interstate commerce, and repugnant to the constitution of the United States.

The court cites but two authorities, the first of which² is, that a State could not interfere to prevent the erection of telegraph wires authorized by an act of congress. In the second case,³ it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the State, was a regulation of foreign and interstate commerce, and therefore beyond the power of the State. The court adds:

"In these cases the supreme authority of congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed whenever that body chooses to exert its powers; and it is also held that the States can impose no impediments to the freedom of that commerce. In conformity with these views, the attempted regulation by Indiana of the mode in which messages sent by telegraph companies doing business within her limits shall be delivered in other States cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power. Whatever authority the State may possess over the transmission and delivery of messages by

¹ Western Union Tel. Co. v. Pendleton, U. S. S. C. May 27, 1887, 7 S. C. Rep. 1126.

² Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

³ Telegraph Co. v. Texas, 105 U. S. 460.

telegraph companies within her limits, it does not extend to the delivery of messages in other States."

PERFORMANCE TO THE SATISFACTION OF THE PROMISEE.

It not unfrequently happens that those who have goods to sell or services to render are so confident of their ability to please or so eager to find a market that they are willing to agree that their performance shall be satisfactory to their promisee, and that unless he is satisfied he shall be under no obligation to accept or pay.

Or a cautious man, determined not to be persuaded into buying what he does not want, will enter into no bargain except upon the condition that he shall be the sole judge of his wants and of the sufficiency of the performance to supply them.

These agreements are expressed in more or less precision of language, but where they are fairly made and are express in declaring the intention, the courts have no hesitation in enforcing them.

It often seems that the promisor has made a losing bargain or exposed himself to the mercy of the promisee, but having made the bargain he must stand by it.

We propose to discuss briefly some of the cases upon this subject, and to extract from them, if possible, what shall appear to be the true and just rule by which such contracts are to be governed.

Thus, in a Massachusetts case,¹ the plaintiff had agreed to make a suit of clothes for the defendant on or before a certain day, and that the clothes should be made to the satisfaction of the defendant. The clothes were made and delivered to the defendant on the day named, but he was not satisfied with them and returned them to the plaintiff, with written notice that they did not fit, were unsatisfactory, and would not be accepted. Plaintiff thereupon wrote to the defendant asking him to come in and let him see what the trouble was and offering to remedy it and to make new ones if necessary. To this letter defendant replied that the clothes were unsatisfactory as they were, and that he

would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit or to accept any alterations in the one already made. He also refused to try on the suit at the store to allow plaintiff to see what the defects were. Thereupon plaintiff brought suit. On the trial, in addition to these facts, it was shown that a custom existed among tailors of having garments tried on after they were finished and of making any alterations that might be necessary to make them fit. The trial court charged the jury that plaintiff was entitled to a reasonable time and opportunity to remedy the defects, and that if he was willing and offered to do so and defendant refused to permit him plaintiff should recover, and he had a verdict.

But the Supreme Judicial Court reversed the judgment, saying: "If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can only recover upon the contract as it was made; and even if the articles furnished by him were such that the party ought to have been satisfied with, it was yet in the power of the other party to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable services and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered." And, further, that "when an express contract, like that shown in the present case, was proved to have been made between the parties, it was not competent to control it by evidence of a usage."

This rule is further illustrated in a case in Michigan.² Here an artist had undertaken to make an enlarged picture from a smaller one, the picture, when completed, to be one that the purchaser would like and that would

¹ Brown v. Foster, 113 Mass. 136; 18 Am. Rep. 463.

² Gibson v. Cranage, 39 Mich. 49; 33 Am. Rep. 351. And the same rule was applied where the picture was to be satisfactory to the defendant's friends. Hoffman v. Gallaher, 6 Daly, 42.

be satisfactory to him. The artist made the picture, but the other party was not satisfied with it, and would not accept or pay for it. The artist endeavored to ascertain what the objections were and had the picture changed in some respects. He then endeavored to have the other party examine it again, but he refused to do so, and the artist brought suit. On the trial the defendant looked at the picture and found it still unsatisfactory to him. The plaintiff urged that he was entitled to have the defects pointed out and to be allowed a reasonable time to remedy them. He failed to recover and appealed to the supreme court, but that court affirmed the judgment, and said: "The plaintiff agreed that the picture, when finished, should be satisfactory to the defendant, and his own evidence showed that in this important particular the contract had not been performed. It may be that the picture was an excellent one and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide this question. Where parties thus deliberately enter into an agreement which violates no rule of public policy and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it. Artists or third parties might consider a portrait an excellent one and yet it might prove very unsatisfactory to the person who ordered it and who might be unable to point out with clearness or certainty the defects or objections. And if the party giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, and this agreed to, he may insist upon his right as given him by the contract."

In a Connecticut case³ the plaintiff, who was a sculptor, agreed to make for the defendant a bust of her deceased husband, stipulating that she was not bound to take it unless she was satisfied with it. The bust was completed, was a fine piece of workmanship and an accurate likeness, but from the very nature of the materials, was destitute of life-like expression and color. The defendant was not satisfied with it and would not accept or pay for it; but her dissatisfaction was based upon grounds applicable to all

busts. The supreme court said: "Courts of law must allow parties to make their own contracts and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. * * In this case the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the best thing of the kind that could possibly be produced. * * A contract to produce a bust perfect in every respect and one with which the defendant ought to be satisfied, is one thing; an undertaking to make one with which she *will* be satisfied, is quite another thing. The former can only be determined by experts. The latter can only be determined by the defendant himself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it."

The cases thus far cited have related rather to articles of taste or artistic sensibility than to those where mechanical fitness or operative capacity were involved. But the rule has not been confined to those cases.

Thus, where the contract was to make a book-case to the satisfaction of the defendant, the same rule was applied.

So in a recent Michigan case,⁴ the question arose in reference to a reaper and binder. Here the terms of the contract were in dispute, plaintiff claiming an absolute sale; defendant alleging that he was not bound to take the machine under the contract unless it was satisfactory to him. In discussing this question, the court (Graves, J.,) say: "The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within one or the other must depend on the special cir-

³ Zaleski v. Clark, 44 Conn. 218; 26 Am. Rep. 446; McCarren v. McNulty, 7 Gray (Mass.), 139.

⁴ Wood Reap. & Mow. Mach. Co. v. Smith, 50 Mich. 565. See also McCormick Harvesting Machine Co. v. Chesrown, 33 Minn. 32.

cumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor and without being liable to disclose reasons or account for his course, and a right to inquire into the grounds of the action and overhaul his determination is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. * * The cases of this class are generally such as involve the feelings, taste or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. The following cases sufficiently illustrate the instances of the first class: *Gibson v. Cranage*, 39 Mich. 49; *Taylor v. Brewer*, 1 M. & S. 290; *McCarren v. McNulty*, 7 Gray 179; *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Rossiter v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Tyler v. Ames*, 6 Lans. 280. In the other class the promisor is supposed to undertake that he will act reasonably and fairly and found his determination on grounds which are just and sensible, and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the ground of it are open considerations and subject to the judgment of judicial triers. Among the cases applicable to this class are *Daggett v. Johnson*, 49 Vt. 345 and *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528."

It is respectfully submitted, however, that all of the cases here cited by the learned judge belong in reality to the same class. Thus, the case of *Daggett v. Johnson*⁵ is cited as laying down a rule contrary to that

⁵ 49 Vt. 345.

of the cases first above referred to, but upon examination it can hardly be considered so. There the defendant had contracted to pay for certain milk pans "if satisfied with the pans." These pans differed from others, and the peculiar excellence claimed for them lay in a certain appliance for graduating the temperature of the milk. In other respects they were like ordinary pans with which defendant was familiar. But without testing them in respect to this appliance, defendant declared himself unsatisfied with the pans and refused to pay for them. But the court held that this action could not be countenanced. The defendant was bound to act in good faith. His dissatisfaction must be actual, not feigned; real, not merely pretended. So in *Mfg. Co. v. Brush*⁶ the general rule was recognized, but the court held that in claiming the benefit of it the defendant was bound to use honesty of purpose. "Anything short of that would not determine his wishes fairly, but only his wilful caprice or his dishonorable design. * * He was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine which would be the wishes of ordinary persons under like circumstances, and therefore was not bound to use the care and skill of ordinary persons in making the determination."

That no departure from the general rule was intended to be made in these cases — unless the addition of the element of good faith, which is emphasized, is to be regarded as a departure — is apparent from the later Vermont case of *McClure v. Briggs*,⁷ where the defendant ordered an organ to be paid for if satisfactory to him. The court say: "But it is said that he was bound to be satisfied, as he had no ground to be dissatisfied. He was bound to act honestly and to give the instrument a fair trial and such as the seller had a right, under the circumstances, to expect he would give it, and therein to exercise such judgment and capacity as he had; for, by the contract, he was the one to be satisfied and not another for him. If he did this and was still dissatisfied and that dissatisfaction was real and

⁶ 43 Vt. 528.

⁷ 58 Vt. 82.

not feigned, honest and not pretended, it is enough and plaintiffs have not fulfilled their contract."

This doctrine is further elucidated in a recent Pennsylvania case⁸ where the defendant ordered an elevator which was "warranted satisfactory in every respect." The court held that this language meant "satisfactory to him;" and that if after testing it he was in good faith dissatisfied, he might reject it, and that his rejection, made in good faith, was conclusive.

And a like rule was laid down in two recent cases in Maryland,⁹ where the court holds that the party is bound "to exercise a fair, just and honest judgment on the subject."

In the later of these cases, Brydon had agreed to furnish to the railroad company a quantity of coal, of such quality as should be satisfactory to the company's master of transportation and master of machinery. After receiving a considerable quantity, the company refused to receive any more on the ground that it had been condemned as unsatisfactory by these officers. In passing upon the contract the court said: "It was, however, to be satisfactory to the officers who were named. But this term of the contract did not give them a capricious or arbitrary discretion to reject it. It was their judgment which was to decide the question of acceptance; but the law required them to exercise a fair, just and honest judgment on the subject. Certainly they were not obliged to accept the coal if they thought it was not fit for the uses contemplated by the contract; neither on the other hand would they be justified in rejecting it for the reason that it did not possess qualities which, at the time of the contract, it was known by the parties that it did not possess. By the terms of the contract the whole decision was committed to them; if they made their decision against the coal in good faith, the defendant would not be obliged to accept it; but if they fraudulently rejected it, their judgment would be without effect in law, and the defendant would not be excused by it."

Other cases cited in the note are to the

same effect.¹⁰ And the same rule applies to cases where services are to be rendered "satisfactorily" to the employer.¹¹ It could hardly be claimed that the latter was not under obligation to give the employee a trial.

A recent case in the Court of Appeals of New York¹² seems, on its face, to lay down a different rule, but we doubt if more was intended by it than to require the dissatisfaction to be in good faith, although the court draws a distinction between that case and many of those cited herein. The fact in that case, which seems to us to be the turning point of the decision, is, that the parties alleging themselves dissatisfied and seeking to escape payment on that ground, nevertheless availed themselves of the articles furnished (boilers) and continued to use them. It could not be held under any rule that such a course was justifiable, and cases in the Supreme Court of New York have recognized the rule of the other States above referred to under like circumstances.

We submit that the following may be said to be the true rule upon this subject and the one upon which all of the cases cited can be harmonized:

Where the performance is by the terms of the contract to be to the satisfaction of the promisee (or to that effect) the promisor must show that the promisee is satisfied, otherwise he has not performed according to his contract, and it is not enough to show that the performance is satisfactory to others, or such that the promisee ought in reason to be satisfied with; provided, however:

1. That where from the nature of the transaction a test of the performance may reasonably be held to have been contemplated by the contract, the promisee is under obligation to make such a test before he declares himself dissatisfied.

2. That in all cases the promisee must act in good faith and with honesty of purpose, and his dissatisfaction, to be a defense, must be real and honest, and not merely feigned or pretended.

Subject to these qualifications the decision

¹⁰ Silsby Mfg. Co. v. Chico, 24 Fed. Rep. 893; Ventilator Co. v. Ry. Co., 66 Wis. 218.

¹¹ Tyler v. Ames, 6 Lans. 280; Spring v. Ansonia Clock Co., 24 Hun, 175.

¹² Duplex Safety Boiler Co. v. Garden, 191 N. Y. 387; 54 Am. Rep. 709. See Gray v. R. R. Co., 11 Hun, 70.

⁸ Slingerly v. Thayer, 108 Pa. St. 391

⁹ Baltimore, etc. R. Co. v. Brydon, 65 Md. 198; 57 Am. Rep. 318; Lynn v. Baltimore, etc. R. Co., 60 Md. 404; 45 Am. Rep. 741. See Herron v. Davis, 3 Bosw. 390.

of the promisee is final and is not subject to revision by courts or juries.

F. R. MECHEM.

Detroit, Mich.

WILL CONTEST—UNDUE INFLUENCE—EVIDENCE—ONUS PROBANDI.

GAY V. GILLILAN.

Supreme Court of Missouri, April Term, 1887.

1. *Will Contest—Undue Influence.*—The undue influence which will invalidate a will must amount to a moral force or coercion, destroying free agency and substituting the will of another.

2. *Same—Onus Probandi—Quantum of Proof.*—Where a will is attacked on the ground of undue influence, in general, the burden of proof is upon the contestant, and it is not sufficient for him to show that the circumstances of the execution of the will are consistent with the hypothesis of undue influence, but he must show an inconsistency between the circumstances of the execution of the will and of its being executed without the interposition of undue influence.

3. *Same—Instruction.*—Hence, an instruction to the effect that it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, is erroneous.

4. *Same—Shifting of Proof.*—Where undue influence is proved, the onus of establishing the fairness and validity of the will is shifted to those claiming under it.

5. *Same—Unreasonable Provisions.*—So, where the will is unreasonable in its provisions and inconsistent with the duties of the testator, with reference to his property and family, those claiming under it must give some reasonable explanation of its unnatural character.

Appeal from Davless circuit court.

The facts sufficiently appear in the opinion of the court which was delivered by SHERWOOD, J.:

This suit is a statutory proceeding to determine whether the instrument executed January 13, 1882, was the last will of Nathan Gillilan, deceased. He died December 17, 1882. Plaintiffs claim that it was made under undue influence, obtained and exercised by his son George, one of the defendants, and the principal beneficiary, by threats of taking his father's life. Other grounds were alleged in the petition, that the testator was not possessed of sufficient testamentary capacity to make a will, and was intoxicated when he signed the instrument in question.

The testimony exhibits a considerable degree of conflict, as to whether the testator was intoxicated when the will was made; as to the condition of his mind at that time, and as to whether there was undue influence exerted in securing the execution of the will.

Objections are taken to the first instruction given on behalf of the proponents of the will; it is as follows:

The jury are instructed that the only issue in this case is, whether or not the instrument in writing, offered in evidence, is the last will and testament of Nathan Gillilan, deceased. And if they find from the evidence that he signed in the manner testified by the subscribing witnesses, and at the time of such signing he had sufficient understanding to comprehend the transaction, the nature and extent of his property, and to whom he was giving the same, the jury should find that he had sufficient mental capacity to make a will, notwithstanding he was, from the use of intoxicating liquors or otherwise, weaker in body and mind than during his more vigorous manhood. And if the jury find that his understanding was thus sufficient they should find that such instrument was, and is, the last will and testament of Nathan Gillilan, unless they further find that the making and signing thereof was procured by an undue influence which amounted to a moral force or coercion, destroying free agency and substituting the will of George W. Gillilan for that of his father, and there must be proof that it was obtained by force or coercion, and in order to set aside the will of a person of the sufficient mental capacity aforesaid on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will, and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony."

This instruction is manifestly erroneous in that portion of it which declares that, "in order to set aside the will, etc., on the ground of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, which cannot be presumed, but must be shown in connection with the will, and it devolves upon those contesting the will to show such undue influence by a preponderance of the testimony."

In civil cases, "it is not necessary that the minds of the jurors be freed from all doubt, it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth." In such cases, "it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party." 1 Greenl. on Ev. (14th ed.), § 13a; 3 *Ib.* § 29. It will be observed that the portion of the instruction now being criticised lays down a rule as stringent in its operation in civil cases as the one which prevails in criminal cases. Indeed, it may be said that the rule laid down in this instance is more stringent than the one obtaining in criminal cases; for, in the latter class of cases, it is usual

to use the qualifying word, reasonable, in connection with the word hypothesis. Wills Circ. Ev., 149; Com. v. Costley, 118 Mass. —.

1. Here it will be noted, that in order to defeat the will of Nathan Gillilan, on the ground of undue influence, the instruction in question requires the contestants to show that the circumstances of the execution of the will are inconsistent with any other hypothesis than such undue influence, whether such hypothesis was a fanciful, or a reasonable one. Even if the qualifying word reasonable had been used in the instruction, it would have been unwarranted under the authorities cited.

Elsewhere it has been determined that, in a civil case, an instruction is erroneous which required a party to establish his claim "by a clear preponderance of the evidence." Bitter v. Saathoff, 98 Ill. 266. In this court an instruction was condemned by intimation, no direct ruling being necessary, which made it a condition precedent to plaintiff's recovery, that they show "by clear and certain proof that defendant did maliciously kill," etc. Culbertson v. Hill, 87 Mo. 553.

In Nichols v. Winfrey, 79 Mo. 544, an action for the wrongful and malicious killing of the plaintiff's former husband, it was laid down that it was not necessary to a recovery of damages that the defendant's guilt should be established beyond a reasonable doubt, but that it was sufficient for the plaintiff to make out her case in accordance with the rules prevalent in other civil cases. And Greenleaf, though in earlier editions asserting a different doctrine, yet, in the last edition it is admitted in a note, that the doctrine of the text is not well supported. 2 Greenl. on Ev., (14th ed.), § 426, and cases cited; 1 *Ib.* § 13a.

And I do not consider that the vice of the words commented on was neutralized by the remaining words of the instruction; for the jury, notwithstanding those remaining words, must have been impressed with the erroneous idea already conveyed to their minds by the former objectionable words.

It is a fact deserving much consideration, that no case has been instanced by counsel where an instruction requiring that those who attack the validity of a will on the ground of undue influence should show that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, has received the sanction of an appellate court.

It is true, that the original of the idea conveyed by the words under discussion is thought to be found in the remarks of Lord Chancellor Cranworth, in Boyce v. Russborough, 6 H. L. Cas., *loc cit.*, 351. But such observations, however appropriate when and where made, should not be used as the basis for an instruction to a jury trying an issue *deviseasit vel non*.

The remarks of the lord chancellor were:

"But in order to set aside the will of a person of sound mind, it is not sufficient to show that the

circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis."

I take it that these words do not go so far as at first blush they might seem to do. I think that the meaning they were intended to convey was simply this: That the burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient for them barely to show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an *equipoise* in the testimony, and the *onus* being on the party attacking the will, he must go a step further and show by any suitable evidence an inconsistency between the circumstances of the execution of the will and of its being executed without the interposition of undue influence. This is all, when rightly understood, I believe, the remarks of the lord chancellor to mean. In other words, the evidence on the part of a party attacking on the ground of undue influence the will of a person of sound mind, must preponderate over the evidence adduced and the presumptions prevailing on behalf of the proponents of the will.

Briefly told, the testimony of disinterested witnesses as to the exercise of undue influence by George over his father, is this:

Nathan, the father, at the time of the execution of the will in question, was nearly eighty years of age. Originally, of a vigorous mind and body, years of excessive indulgence in strong drink, as well as advanced age, had greatly impaired his former mental and physical vigor. His son, George, had acquired dominion over him, as the following testimony shows. He frequently annulled "trades" his father had made. He caused his aged father great distress of mind by circulating reports that his father had debauched his wife. This, he admitted when on the witness stand, merely denying that he had ever accused his father of that crime to his face. He also admitted that he had told others that he would charge his father with that crime in his petition for divorce from his wife.

On the very morning of the day the will was made George had a quarrel with his father, called him a liar, cursed him, seized a chair and threatened to mash him through the floor. When this occurred his father fled through the door, crying out, don't let him hurt me. Thereupon, Jas. Clendemin, a grandson of the testator, was called to come in from the barn and he did so, and rebuked his uncle for his brutal conduct. This was the testimony of Massingill, a tenant on the testator's farm, who also testified that George quarrelled with his father whenever George came to his father's house, and his father seemed afraid of him. Massingill also testified, that on the occasion referred to, before George picked up the chair to strike his father, the latter had threatened to disinherit him, and reminded him of the falsehoods he had told about him respecting his wife.

The testimony of Massingill is substantially corroborated by Mrs. Massingill, his wife. These witnesses are entirely disinterested and they stand unimpeached. Their testimony is also supported by that of another disinterested witness, the divorced wife of George, plainly showing the dread with which George had inspired his father, and the fear the latter had, should he change his will, of being killed by his son. There is abundant evidence of the same sort throughout this record, but I have chosen to mentioned first, that of impartial witnesses. No one can read this record without being painfully impressed with the idea that George, by his most unfilial conduct and threats, had placed the mind of his aged and infirm father in complete subjection to his demands. And it can make no difference how much undue influence was acquired over the mind of a father, already enfeebled by advancing years and the infirmities incident to long-continued habits of excessive dissipation; whether by slanders or threats, or by a combination of these unwarranted means. My ideas on this point I find very aptly and forcibly expressed in the charge of Sir J. P. Wilde, in *Hall v. Hall*, 1 P. & D. Law Rep. 481, where, in summing up, he gave the following direction to the jury on the question of undue influence:

"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion appeals to the affections of ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, there are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears of the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else."

And where undue influence is once proven to exist, by whatsoever means produced or acquired; whenever the mind of one person is reduced to a state of vassalage to that of another, and a gift is shown to have been made by the weaker party to the stronger, there the burden of proof will be shifted; the gift will become presumptively void, and the *onus* of upholding its fairness and validity will rest upon the shoulders of the recipient of the gift. This rule is firmly established in regard to gifts made by deed, and the same principle holds in regard to wills, and so this court has declared.

Garvin's Admr. v. Williams, 44 Mo. 465; Harvey v. Sullens, 46 Mo. 147.

And though it is said that a court of equity will not set aside a will obtained by fraud, though no satisfactory reason has ever been given why it should not do so, yet such a court will interfere "where the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in unduly obtaining the consent of the next of kin to the probate, courts of equity will lay hold of these circumstances to declare the executor a trustee for the next of kin." 1 Story Eq. Jur., §§ 184, 238, 252, 254, 440. In *Gaines v. Chew*, 2 How. (U. S.) 619, Justice McLean, speaking for the court, gave a very strong intimation that if all other and ordinary methods of procedure failed of securing the requisite redress in the probate court, a court of chancery might feel called upon to fall back on its own inherent powers in order to accomplish the end desired.

The foregoing instances of a court of equity refusing to interfere where fraud clothes the whole will as with a garment, and yet interferes where it vitiates with its foul touch "some particular clause," is the only instance to be found in the books, where a court of equity fails to observe its predominant maxim to do "nothing by halves."

But notwithstanding the refusal of a court of equity to entertain jurisdiction of a proceeding to set aside a will obtained by fraud, yet these equitable principles which obtain in that court respecting deeds and other contracts obtained by fraudulent contrivances, are constantly and of necessity applied by courts of law in instances and upon issues like the present one. This was so ruled in the two cases cited from our own reports. And the rule is the same elsewhere. Where confidential or fiduciary relations exist, and a gift be bestowed or a contract be made between such parties, then the party occupying the attitude of guardian, agent, trustee, medical adviser, etc., who is the recipient of such gift, etc., has the *onus* to bear of establishing the absolute fairness of the given transaction. *Sheet v. Goss*, 62 Mo. 226, and cases cited; *Yost v. Laughvan*, 40 Mo. 594, and cases cited; *Cadwalder v. West*, 48 Mo. 483. And while it is true that undue influence will not be presumed, yet where such facts are proven as will authorize a jury to find the existence of undue influence, then the burden shifts, and it then devolves on the party charged to exonerate himself from such charge in like manner, as in the case of fiduciary or confidential relations. Courts of law, where called upon for redress in such cases, give it on precisely the same principle that guides courts of equity in analogous cases. That principle of redress, in order to be fully efficacious, must be as broad in its application as the mischief it is designed to meet and to remedy. In the apt and forcible language of Sir Samuel Romilly, in his celebrated reply in *Huguenin v. Baseley*, 14 Ves. 285-286: "The relief stands upon a general principle, applying to all the variety of relations

in which dominion may be exercised by one person over another."

The only diversity observable in the application of the principle in question, being this: That in case of fiduciary relations, a court of equity will presume confidence placed and influence exerted. Where no such relations exist, the influence or the dominion acquired must be proven; but where proven, the rule which equity applies is the same in the latter as in the former class of cases. 2 Pom. Eq., § 951, and cases cited; *Dent v. Bennett*, 4 Myl. & Cr. 269; *Smith v. Kay*, 7 H. L. Cas. 779, per Lord Kingsdowne.

There is yet another ground why the *onus* should rest on the proponents of this will: The testator, without apparent cause, virtually disinherited four out of six of his children or their descendants. George received the "lion's share," and his brother John D., the substantial residue.

It is laid down by a writer of eminent authority that, "where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his property and family, * * * this of itself will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will."

"Gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will or otherwise, may change the burden and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate offspring of a rational, self-poised and clearly disposing mind." 1 Redf. on Wills, pp. *515, *537; *Lynch v. Clements*, 24 N. J. Eq. 431, and cases cited.

For the reasons given, the instruction must be held erroneous, and the judgment is reversed and the cause remanded, with directions to proceed in conformity with this opinion.

All concur.

NOTE.—*Undue Influence — What Constitutes.*—As to imputed undue influence, the law gives general rules; but as to the ultimate facts whether the testator's mind was or was not left free to consent or dissent, there is no prescribed or fixed principle by which the court can attain a conclusion. Upon that fact the jury must pass.¹

Any influence which induces a testator to make a disposition of property which he does not desire or intend, notwithstanding he is not controlled by any act of force, coercion or persuasion, put forth at the time of signing, is such undue influence as will avoid the will.²

Undue influence is not that which is obtained by modest persuasion, or by argument addressed to the understanding, or by mere appeals to the affections. It must be an influence obtained either by flattery, excessive importunity or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency and constraining him to do, against his free will, what he is unable to refuse.³

¹ *Thompson v. Farr*, 1 Spears, 33.

² *Forney v. Ferrell*, 4 W. Va. 729.

³ 2 Green, on Ev. (14th ed.), pp. 676, 677, § 688, and cases in notes 1 and a.

To constitute undue influence it must be shown that there was fraud or moral coercion of such restraint upon the will as to destroy free agency.⁴

Though a man may have a mind of sufficient soundness and discretion to manage his own affairs in general, still, if such a dominion or influence be obtained over him as to prevent him from exercising that discretion in the making of a will, he cannot be considered as having such a disposing mind as will give it effect.⁵

"The influence which will set aside a will must amount to force and coercion, destroying free agency. It must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a strong ground in favor of a testamentary act. Further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."⁶

In questions of undue influence a wide range of inquiry is permitted.⁷

"In the interpretation of these words some latitude must be allowed. In order to come to the conclusion that the will has been obtained by coercion, it is not necessary to establish that actual violence has been used or threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terror may have been created sufficient to deprive him of free agency."⁸

Undue influence is a relative term, like many others in the law.⁹ Opportunity and interest are not alone sufficient to sustain a finding of undue influence.¹⁰ The evidence must justify the conclusion of a present constraining operative power upon the mind at the time of the act, but undue influence need not be shown to have been exerted at the exact time of making the will.¹¹ Yet such influence exerted long before¹² or after¹³ the act, is not alone sufficient, but may, in connection with other circumstances, raise a presumption of its existence at the time.¹⁴

An aged and weak-minded person, though possessed

⁴ *Bailey on Onus Probandi*, cases on pp. 400, 401, 402, see for numerous illustrations.

⁵ *Kerr on Fraud and Mistake*, 296; *Mountain v. Bennett*, 1 Cox, 355.

⁶ 2 *Williams on Ex. and Admr.*, ch. 1, § 2. See further *Kerr on F. & M.* 298; *Kinleside v. Harrison*, 2 Phillim. 551; *Baker v. Batt*, 2 Moo. P. C. 321; *Hall v. Hall*, 1 Pr. & Div. 462; *Parfit v. Lawless*, 2 Id. 472; *Paske v. Ollatt*, 2 Phillim. 323; *Barry v. Butlin*, 2 Moo. P. C. 480; *Walker v. Smith*, 29 Beav. 394; *Jones v. Godrich*, 7 Moo. P. C. 16; *Greville v. Tylee*, Id. 320; *Dean v. Negley*, 41 Pa. St. 312; *Williams v. Gonde*, 1 Hagg. 577, 581; *Galthier v. Galthier*, 20 Ga. 709.

⁷ *Abbott's Trial Ev.*, 121.

⁸ *Per Chancellor Crantworth in Boyse v. Russborough*, 6 H. L. Cas. 48.

⁹ *Boyd v. Boyd*, 66 Pa. St. 293.

¹⁰ *Seguine v. Seguine*, 3 Abb. Ct. App. Dec. 191; *Cudney v. Cudney*, 68 N. Y. 148.

¹¹ *Taylor v. Wilburn*, 20 Mo. 306; s. c., Redf. Am. Cases on Wills, 412; *Davis v. Calvert*, 5 Gill & J. 260; s. c., 25 Am. Dec. 282; s. c., Redf. Am. Cases on Wills, 490; *Fulton v. Andrew*, L. R. 7 H. L. Cas. 448; *Roberts v. Trawick*, 17 Ala. 55; s. c., 62 Am. Dec. 164.

¹² *McMahon v. Ryan*, 20 Pa. St. 329.

¹³ *Eckert v. Flowery*, 43 Pa. St. 46.

¹⁴ *Abbott's Trial Ev.* 121; 1 Wms. on Ex. (6th Am. ed.) 72; *Kerr on F. & M.* 300; *Jones v. Godrich*, 5 Moo. P. C. 40.

of intelligence sufficient to make a will, may be controlled by an influence which would not ordinarily be called force or coercion, and under such circumstances a will may be void as the result of over importunity and undue persuasion. It is sufficient if the influence has the effect of producing illusion or confusion in the mind of such testator so as either to overcome free agency or the power of judging upon the true relations between themselves and those who may be supposed to have just claims upon their bounty.¹⁵

Mr. Justice Wilde lays down the rule that "pressure of whatever character," "whether acting on the fear or hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is used or threatened."¹⁶

The undue influence may be exercised by means of fraud.¹⁷ Thus, where "a wife, by falsehood, raises a prejudice in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relations to the end that these impressions, which she knows he has thus formed to their disadvantage, may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive."¹⁸ This rule also applies to the revocation of a will.¹⁹

Summary.—The authorities establish the rule that an issue whether a will was obtained by fraud ought not to be submitted to a jury, unless there is reasonable evidence (1), that the fraud was practiced; (2) that its influence continued so that the testator was laboring under it at the time he made his will, and (3) that he was by this means induced to make his will.²⁰

So, to authorize a submission of undue influence, there must be reasonable evidence (1), that the person charged had influence over the testator; (2) that he exercised that influence over the testator to the extent of coercion in relation to the will itself, and (3) that the execution of the impeached instrument was procured by the exercise of such undue influence as the *causa causans* of the act itself.²¹

Evidence—Onus Probandi.—The burden of proof, in general, is upon the party charging fraud or undue influence,²² and turns upon particular circumstances of

each transaction.²³ Thus, where no defect of powers on the part of the testator is indicated, the burden of proving undue influence is on the party alleging.²⁴ The burden requires for its discharge evidence of something more than importunity.²⁵

The execution of a will with due solemnities by a person of competent understanding and apparently a free agent, being duly proved, the presumption is that the testator was duly cognizant of its contents and that the instrument expressed his will,²⁶ unless there be other circumstances to lead to a different conclusion, in which case the burden of proof lies upon the party propounding the will, and the court will not pronounce in its favor unless it is judicially satisfied that the instrument propounded is the last will of a free and capable testator.²⁷ And fraud or undue influence may be proved either by direct or circumstantial evidence. "Circumstantial evidence is enough, for a jury is at liberty to infer undue influence, not as matter of surmise, but if the evidence leaves no other rational hypothesis on which the conduct of the testator can be accounted for."²⁸

But, in order to set aside a will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis that it was obtained by undue influence, it must be shown that they are inconsistent with a contrary hypothesis.²⁹

In case of weakness of mind, arising from age or otherwise, strong evidence may be required that the contents were fully known to and approved by the testator,³⁰ and that the execution was his spontaneous act.³¹

So, where the testator is shown to have a weak mind, though not sufficiently so to create testamentary incapacity, and a person whose advice has been sought and taken receives a large benefit under the alleged will, such person must show affirmatively all the circumstances connected with the drawing of such will, and that the testator had a full understanding of the nature of the disposition contained in it.³² And where it is shown that the beneficiary and the testator stood in an intimate or fiduciary relation toward each other,

500; *McMeechen v. McMeechen*, 17 W. Va. 688; s. c., 41 Am. Rep. 682, with note 686; *Pierce v. Pierce*, 3 Cent. L. J. 225; 38 Mich. 412; *Glover v. Hayden*, 4 Oush. 580; *Taylor v. Wilburn*, 20 Mo. 306.

²³ *Bailey on Onus Probandi*, 398 (1886).

²⁴ *Baldwin v. Parker*, 99 Mass. 79; *Tyler v. Gardner*, 25 N. Y. 559; *Williams on Ex.*, 72, n.; *Abbott's Trial Ev.*, 119.

²⁵ *Gardiner v. Gardiner*, 34 N. Y. 155; *Van Dusen v. Rewley*, 8 N. Y. 358. See also cases cited on pp. 398 and 399, in *Bailey's Onus Probandi*.

²⁶ *Boyse v. Russborough*, 6 H. L. Cas. 49; *Browning v. Budd*, 6 Moo. P. C. 435.

²⁷ *Kerr on F. & M.* 294; *Browning v. Budd*, 6 Moo. P. C. 435.

²⁸ *Kerr on F. & M.* 301. See *Lord Langford v. Purdon*, 1 L. R. I. 80; *Barry v. Butlin*, 2 Moo. P. C. 491.

²⁹ *Tyler v. Gardiner*, 35 N. Y. 610, and cases; *Boyse v. Russborough*, 6 H. L. Cas. 51. See 1 *Jarm. on Wills* (5th Am. ed.), p. 138, note e.

³⁰ *Mitchell v. Thomas*, 6 Moo. P. C. 157; *Durnell v. Corfield*, 1 Roberts, 68; 8 Jur. 915.

³¹ *Tribe v. Tribe*, 13 Jur. 798; *Kerr on F. & M.* 296.

³² *Cuthbertson's Appeal*, 97 Pa. St. 163; s. c., 2 Am. Prob. Rep. 54. See *Fraw v. Clarke*, 30 P. F. Smith, 170; *Boyd v. Boyd*, 16 Id. 283; *Drake's Appeal*, 45 Conn. 9; s. c., 1 Am. Prob. Rep. 227; *Wainwright's Appeal*, 87 Pa. St. 220; s. c., 1 Am. Prob. Rep. 43; *Milton v. Hunter*, 15 Bush, 163; s. c., 1 Am. Prob. Rep. 521; *Wilson's Appeal*, 99 Pa. St. 545; *Harvey v. Sullen*, 46 Mo. 147, 159; *Riddle v. Johnson*, 25 Gratt. 152; *Evans v. Arnold*, 52 Ga. 169.

¹⁵ See 1st Redf. on Wills (4th ed.), 528.

¹⁶ *Hall v. Hall*, L. R., 1 P. & M. 481; *Darley v. Darley*, 3 Brad. 508.

¹⁷ *Kerr on F. & M.* 299.

¹⁸ *Boyse v. Russborough*, 6 H. L. Cas. 49. Compare *Browning v. Budd*, 6 Moo. P. C. 430.

¹⁹ *Allen v. MacPherson*, 1 H. L. Cas. 307; *Lord Langford v. Purdon*, 1 L. R. I. 82.

²⁰ *Kerr on F. & M.* 300, 301; *Lord Langford v. Purdon*, 1 L. R. I. 75.

²¹ *Kerr on F. & M.* 301. See also note a to section 688, 2 Green. on Ev. (14th ed.); Redf. on Will, pt. 1, 497-537. Also see the following recent cases: *Conover v. Conover* (N. J.), 8 Atl. Rep. 500; *Kerrigan v. Leonard* (N. J.), 8 Atl. Rep. 508, with note; *Blume v. Hartman* (Pa.), 8 Atl. Rep. 219; *In re Will of Pemberton*, 4 Atl. Rep. 770; *Pemberton v. Pemberton* (N. J.), 7 Atl. Rep. 642, with note.

²² *Renn v. Lamon*, 33 Tex. 760; *Davis v. Davis*, 123 Mass.

such as that of parent and child,³³ or grandchild,³⁴ husband and wife,³⁵ physician and patient,³⁶ legal adviser and client,³⁷ confessor and penitent,³⁸ guardian and ward,³⁹ or agent and principal, and that the beneficiary drew the will or gave instructions to the draftsman,⁴⁰ or was concerned in clandestine execution,⁴¹ the burden of proof is on him.⁴²

Instructions.—For instructions which have been examined and approved by the highest courts in will contests, see the cases in foot notes; as to testamentary capacity;⁴³ as to testamentary capacity and undue influence,⁴⁴ and as to undue influence.⁴⁵

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³³ Tyler v. Gardner, 36 N. Y. 559.

³⁴ Carrol v. Norton, 3 Bradf. 291.

³⁵ Baker's Case, 2 Redf. Surr. 179, and cases; Delafield v. Parrish, 25 N. Y. 9.

³⁶ Ashfield v. Lomi, L. R., 2 P. & D. 477; s. c., 4 Moak's (Eng.), 700.

³⁷ Wilson v. Moran, 3 Bradf. 172; Parfitt v. Lawless, L. R., 2 P. & D. 462, 468; s. c., 4 Moak's (Eng.), 692.

³⁸ McGuire v. Kerr, 2 Bradf. 244; Parfitt v. Lawless, *supra*.

³⁹ Limburger v. Rauch, 2 Abb. Pr. (N. S.) 271; *In re Paige*, 62 Barb. 476.

⁴⁰ Delafield v. Parrish, 25 N. Y. 9.

⁴¹ Ashwell v. Lomi, *supra*.

⁴² But see, in this connection, Post v. Mason, 91 N. Y. 539; s. c., 3 Am. Prob. Rep. 43, and note, p. 52. Also opinion of Chancellor Warworth, *In re Van Horn*, 7 Paige, 46; Breed v. Pratt, 18 Pick. (Mass.) 115; Meek v. Perry, 36 Miss. 130; Patterson v. Patterson, 6 Serg. and R. 55.

⁴³ American Bible Society v. Price, 115 Ill. 632, 633, 634; McClintock v. Curd, 32 Mo. 421, 422; Lowder v. Lowder, 58 Ind. 540, 541, 542; Bundy v. McKnight, 48 Ind. 509-512; Bates v. Bates, 27 Iowa, 115, 116; Frazer v. Jennison, 43 Mich. 220, 221, 222; Mears v. Mears, 15 Ohio St. 98; Cline v. Lindsey (Ind.), 11 N. E. Rep. 411. See also Sackett's Instructions to Juries, pp. 424-442, 443.

⁴⁴ Will of Convey, 52 Iowa, 197; s. c., 1 Am. Prob. Rep. 90.

⁴⁵ Pratte v. Coffman, 33 Mo. 72, 73; McClintock v. Curd, 32 Mo. 411; Bundy v. McKnight, 48 Ind. 515, 516, 517. See also Sackett's Instructions to Juries, pp. 442-448.

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1. ACCEPTANCE—Damages—Warranty.—One who orders goods to be made and sent to him and retains them until he can consult as to his liability, does not thereby accept the goods. Such a purchaser, if the goods are warranted, may retain the goods and yet sustain a counterclaim for damages for a breach of warranty.—*Norton v. Dreyfuss*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 428.

2. ACCEPTANCE—Notice—Guaranty—Default.—Circumstances set forth under which it is unnecessary to give notice of the acceptance of a guaranty. When a guaranty is for the performance of an act by another person, the guarantors are entitled to receive notice of the party's default.—*Furst, etc. Co. v. Black*, S. C. Ind., June 21, 1887; 12 N. E. Rep. 504.

3. ACCIDENT INSURANCE—Due Diligence.—An insurance policy insures against bodily injuries "effected through external, violent and accidental means," and also contains a proviso that the "insurance shall not extend to any bodily injuries, where death injury may have happened in consequence of violent exposure to unnecessary danger, hazard, etc., and that the policy is subject to the condition that the insured use" due diligence for personal safety: *Held*, that a railroad employee sent to work on the track, and there killed by an engine, received bodily injury through external, "violent and accidental means," and that the burden of proof was upon the company to show lack of "due diligence for personal safety."—*Freeman v. Travelers' Ins. Co.*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 372.

4. ACCOUNTS—Partnership—Promissory Note—Appeal—Practice.—A court will not usually entertain an action to settle the accounts of partners until they are so far adjusted that a final settlement can be effected by its judgment. A note by a firm to one of the partners may be enforced against the firm by a bona fide holder, but not if the holder stands in the shoes of the payee. The overruling of a demurrer to a bad answer is reversible error.—*Thompson v. Lowe*, S. C. Ind., June 16, 1887; 12 N. E. Rep. 476.

5. ACCOUNT STATED—Interest.—When a party, in an account stated, charges himself with interest at the rate of ten per cent. on money in his hands, a promise to pay such interest will be implied.—*Savage v. Aiken*, S. C. Neb., June 8, 1887; 33 N. W. Rep. 241.

6. ACTION—Default—Judgment—Setting Aside—Statute.—When, in an action, the defendant makes a default and judgment is rendered against him, the court will, in a proper case and upon suitable proofs and affidavits, set aside the judgment and reinstate the case. Massachusetts statutes construed.—*Keith v. McCaffrey*, S. J. C. Mass., July 1, 1887; 12 N. E. Rep. 419.

7. ADMINISTRATOR—Promissory Note—Payable to P or Bearer.—If the husband of the owner of a note payable to "P or bearer" collects the amount of the note from the maker thereof, the administrator of the wife, may, nevertheless, collect the amount from the maker as he had no right to pay the husband.—*Chappelear v. Martin*, S. C. Ohio, April 26, 1887; 12 N. E. Rep. 448.

8. AGENCY—Fraud—Bills of Lading—Estoppel.—If an agent, whose usual duty it is to receive and forward goods, issues fraudulent bills of lading for goods not received and shipped, and money is advanced upon such bills, the agent's principal is liable for such money as the act of the agent was within the apparent scope of his authority, and the principal is estopped to disavow his acts.—*Bank of Bolivia v. New York, etc. Co.*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 433.

9. AGENCY—Factor—Warehouseman—Statute.—A warehouseman advancing money to a commission merchant on grain stored with him, cannot hold the grain against the owner thereof, if he is aware that the commission merchant was the agent of the owner and was raising money for his own use. The New York factors' act does not protect in such a case.—*Dorrance v. Dean*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 433.

10. AGENT—Liability—Vendee.—A party cannot recover money paid an agent, which the agent has remitted to his principal, by suit against the agent, whom he knew at the time to be only an agent.—*Bailey v. Cornell*, S. C. Mich., May 5, 1887; 33 N. W. Rep. 50.

11. ALTERATION OF INSTRUMENTS—Honest Intent—Effect of Subsequent Payments.—Plaintiff, without fraudulent intent, corrected a mistake in the date of a note given by a decedent, and after such correction the deceased made two payments on said note, without being deceived by the alteration. Plaintiff had judgment for the amount due with seven per cent. interest: Held, that the subsequent payments remove the presumptive effect of the alteration.—*Johnson's Estate*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 413.

12. ANIMALS—Action for Damages.—In an action under How. Stat. Mich. § 2119, against the owner of a vicious dog, for damages for its biting a child, the declaration alleged that defendant was the "keeper" of the dog: Held, that if its shown that the dog had been enticed away from defendant by the child's father, and was kept on his premises as its home at the time of the injury, there could be no recovery.—*Burnham v. Strother*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 410.

13. APPEAL—Complaint—Demurrer—Law of the Case—Life Insurance.—A complaint good on demurrer is a *fortiori* good if attacked for the first time on appeal. The ruling of the supreme court in the decision of a case is the law of the case in subsequent proceedings. Premiums paid upon a valid risk cannot be recovered as money had and received.—*Continental, etc. Co. v. Hauser*, S. C. Ind., June 17, 1887; 12 N. E. Rep. 479.

14. APPEAL—Docketing—Dismissal—Constitutional Law.—After the appellant has entered his appeal on the docket, the appellee cannot take advantage of his failure to docket in time. The law requiring twenty days' notice of a motion to dismiss an appeal for insufficient bond is constitutional, though it applies to pending suits.—*Rollins v. Love*, S. C. N. Car., April 25, 1887; 2 S. E. Rep. 166.

15. APPEAL—Certiorari.—A writ of *certiorari* will not be allowed to review proceedings to open a highway, when it is based upon defects in the proceedings returned to the clerk, and where the affidavit for its issuance is made by the plaintiff's attorney, and does not show title in the petitioner to the lands taken, the title in him not being admitted, nor that the petitioner had no opportunity to exercise his statutory right to appeal from the award of damages.—*Nightingale v. Simmons*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 414.

16. APPEAL—Exceptions—Consideration.—An exception to a decision of the court will not generally be considered, when the grounds therefor are not stated.—*Hooper v. Chicago, etc. R. Co.*, S. O. Minn., May 30, 1887; 33 N. W. Rep. 314.

17. APPEAL—Joint Assignment of Error.—A joint assignment of error must be good as to all who join therein, or it will not be good as to any of them.—*Walker v. Hill*, S. C. Ind., June 14, 1887; 12 N. E. Rep. 387.

18. APPEAL—Justice—Entry of Verdict.—In Dakota, an appeal may be taken from a justice of the peace

after the entry of a verdict, though no formal judgment is entered.—*Porter v. Parker*, S. C. Dak., February Term, 1887; 33 N. W. Rep. 70.

19. APPEAL—Partnership—Accounts.—An appeal in a partnership case, where the accounts between the partners have been examined by a referee, the appellate court examines only the disputed items.—*Rohr v. Pearson*, S. C. Oreg., May 2, 1887; 14 Pac. Rep. 297.

20. APPEAL—Record—Other Papers.—Where, in proceedings in error upon a case made, it is not shown that any judgment was rendered, nor that a motion for a new trial was overruled, the court cannot consider the alleged errors of law occurring at the trial. A case made cannot be supplemented or completed by having added or attached to it certified copies of the record.—*City of Fort Scott v. Deeds*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 268.

21. APPEAL—Record—Presumptions.—When none of the proceedings of a trial are returned, it will not be presumed that any of the findings are improper, though some of them are outside of the issues raised by the pleadings.—*Wryell v. Jones*, S. C. Minn., June 8, 1887; 33 N. W. Rep. 43.

22. APPEAL—Review—Preliminary Matter.—Where, in an action of trespass, one of the defendants has died, a finding that an agency between the deceased and the other defendants has not been established so as to make the acts and statements of the deceased admissible against the defendants, is not reviewable on appeal.—*Smith v. Kron*, S. C. N. Car., May 21, 1887; 2 S. E. Rep. 533.

23. APPEAL—Weight of Evidence.—An order, setting aside a verdict as not justified by the evidence will not be reversed on appeal, unless the preponderance of the evidence is manifestly and palpably in favor of the verdict.—*Hensel v. Chicago, etc. R. Co.*, S. C. Minn., June 13, 1887; 33 N. W. Rep. 329.

24. APPEAL—Weight of Evidence—Improper Testimony.—A verdict will not be set aside on appeal on account of the weight of evidence, nor because improper testimony was admitted, which was not objected to.—*Higinbotham v. Fair*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 267.

25. ASSIGNMENT FOR CREDITORS—Preference—Concealment of Assets.—An assignment for the benefit of creditors is not void, because it provides for paying the fee of the lawyer, who prepared the assignment, nor because the assignor concealed part of his assets.—*Verner v. Davis*, S. C. S. Car., March 11, 1887; 2 S. E. Rep. 114.

26. ASSUMPSIT—Jurisdiction—Consideration.—Where a party conveys property to one child in consideration that he will pay money to other children, a suit to enforce this agreement should be brought at law, and not in equity, and parol evidence is admissible to show how and to whom the purchase money was to be paid.—*Calvert v. Nickles*, S. C. S. Car., March 17, 1887; 2 S. E. Rep. 116.

27. ATTACHMENT—Action for Wrongful Delay.—An action for damages for delay in shipping goods, owing to an attachment, when the goods were exempt, of which fact neither the plaintiff in the attachment suit, the constable nor the carrier was aware, cannot be maintained.—*Hynds v. Wynn*, S. C. Iowa, June 7, 1887; 33 N. W. Rep. 73.

28. ATTACHMENT—Amendment—Waiver.—An affidavit for attachment framed in the alternative is fatally defective and is not amendable, and the defect is not waived by the release of the property by the execution of an undertaking.—*Winters v. Pearson*, S. C. Cal., June 17, 1887; 14 Pac. Rep. 304.

29. ATTACHMENT—Real Estate—Posting Notice.—An attachment of a large number of town lots of a non-resident is not violated by the failure of the officer to post a copy of the order on each lot.—*Blake v. Rider*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 290.

30. ATTACHMENT—Right to.—An attachment rests

upon its own facts and not upon the facts of the case.—*Reed v. Mahen*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 232.

31. **BANKS—Trusts—Assignment for Creditors.**—When a bank delivers a deed for a customer, and, instead of receiving the money therefor, takes certificates of deposit issued by itself, there is a trust on its funds to that amount in the hands of the assignee for the benefit of creditors.—*Francis v. Evans*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 93.

32. **BENEFIT SOCIETIES—Insurance—Beneficiary.**—Benefit societies may, unless forbidden by their charters, designate by their by-laws the relatives to whom death benefits of deceased members shall be paid, in the absence of instructions by the member himself on that subject.—*Addison v. New England, etc. Assn.*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 507.

33. **BILLS AND NOTES—Indorsement—Equities.**—The indorsement of a note to A, though in reality A holds it merely for B, is not such an indorsement as will exclude the equities against the payee.—*Elias v. Finnegan*, S. C. Minn., June 16, 1887; 33 N. W. Rep. 330.

34. **BILLS AND NOTES—Indorsement—Set-off—Partnership.**—A defense on a note that, when it matured, A owned it, who then owed the maker on an unsettled partnership, cannot be set up at any rate till an accounting thereon is had, and until A is made a party to the suit.—*Wilcox v. Comstock*, S. C. Minn., June 2, 1887; 33 N. W. Rep. 42.

35. **BILLS AND NOTES—Presentment—Delay—Handwriting.**—In Idaho, in a suit on a note indorsed to the plaintiff after maturity, it is a question for the court, in an action against the indorser, to decide whether the delay in presenting the note for payment was unreasonable. Evidence of experts as to the handwriting of the indorser on the note, who, after the institution of the suit have examined admittedly genuine signatures of the indorser, is admissible.—*Durnell v. Sowden*, S. C. Utah, June 29, 1887; 14 Pac. Rep. 334.

36. **BILLS AND NOTES—Subscription—Diversion.**—The maker of a note can claim a failure of consideration in a suit by the payee on a note subscribed for a certain purpose, when in violation of the oral agreement it has been diverted to another purpose.—*Simpson Cent. College v. Tuttle*, S. C. Iowa, June 7, 1887; 33 N. W. Rep. 74.

37. **BOUNTY—County—Limitations—Contract.**—A county is not liable, under the statutes of Indiana, for bounties agreed by an ex-member of the county to be paid to certain soldiers already in the service, especially as no action was taken for more than six years to enforce the claim.—*Board, etc. Cass Co. v. Crockett*, S. C. Ind., June 21, 1887; 12 N. E. Rep. 485.

38. **CARRIERS—Attachment—Liability.**—A carrier, in whose hands goods delivered to him by a mortgagee thereof are attached by a sheriff under a process to attach property of the mortgagors, who notifies the mortgagee at once of the attachment, is relieved from all liability for the non-delivery of the goods at the place of consignment.—*Pingree v. Detroit, etc. R. Co.*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 298.

39. **CARRIER—Damages to Feelings—Question for Jury.**—It is a question for the jury, in mitigation of damages, whether a passenger was obstinate and foolish in insisting on being put off the train, and in such case to give no damages for wounded feelings.—*Gibson v. East Tennessee, etc. Co.*, U. S. C. C. (Tenn.), June 8, 1887; 30 Fed. Rep. 904.

40. **CARRIERS—Refusal to Accept Goods—Damages.**—When a connecting railroad refuses to accept goods to carry, loaded on cars of another company, damages are presumed to ten per cent. of their value, and to bring them up to twenty-five per cent., as allowed, the plaintiff may show all elements of damages admissible in other actions, including a necessity thereby of selling them at greatly reduced rates.—*Central R. Co. v. Logan*, S. C. Ga., Jan. 26, 1887; 2 S. E. Rep. 465.

41. **CHATTEL MORTGAGE—Attachment—Trove.**—

Where, by collusion with the mortgagor in a chattel mortgage, an attachment suit is begun, and the chattels seized and sold upon meane process, the mortgagee may bring an action of trover against the purchaser, he being a party to the fraud.—*Creeker v. Atwood*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 421.

42. **CONTRIBUTION—Wrong-doers—Negligence—Payment—Subrogation.**—The rule that contribution does not exist among wrong-doers, only applies when the party seeking contribution is presumed to have known he was doing wrong. It does not apply when the liability arose from negligence in conducting a lawful business. It is not necessary to wait for a levy before payment, and one who pays more than his share, after filing notice of payment and claim to contribution, may issue execution on the original judgment to enforce contribution from the others.—*Ankenny v. Moffett*, S. C. Minn., June 14, 1887; 33 N. W. Rep. 320.

43. **CONSTITUTIONAL LAW—Damages by Log-driving—Lien.**—Act No. 142, Mich. Laws 1885, amendatory of § 10 of law of 1879, relating to damages caused riparian owners by log-driving, provides for certain arbitration proceedings, but the provision for a lien on the logs for such damages is also found in the act of 1879: Held, that the question of the constitutionality of the act of 1885, by reason of the provision for arbitration, is immaterial in a case involving merely the claim of a lien for damages.—*Gratwick Lumber Co. v. Lewis*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 445.

44. **CONSTITUTIONAL LAW—Interstate Commerce—Habeas Corpus.**—A law requiring a license from traveling salesmen is void as to a salesman taking orders for goods to be delivered from another State, and a party arrested under that law may be released by habeas corpus.—*Ex parte Rosenblatt*, S. C. Nev., June 30, 1887; 14 Pac. Rep. 298.

45. **CONSTITUTIONAL LAW—Police Power—Regulating Travel on Bicycles.**—Priv. Acts N. C. 1885, ch 14, forbidding all persons from using a bicycle on a certain turnpike road without the express permission of the superintendent, does not deprive one of the use of his property without "due process of law," and merely regulates the use, and is a valid exercise of the police power of the State.—*State v. Yopp*, S. C. N. Car., May 30, 1887; 2 S. E. Rep. 458.

46. **CONTRACT—Arbitration.**—Damages cannot be recovered for breach of a contract which provides for a submission to arbitration, unless the party has offered so to submit. In the absence of fraud or mistake the award of arbitrators is final.—*U. S. v. Ellis*, S. C. Ariz., July 3, 1887; 14 Pac. Rep. 300.

47. **CONTRACT—Clerk—Partnership—Consideration.**—When a clerk in the employ of a partnership is voluntarily promised by one partner a liberal royalty for selling for them a preparation, the formula whereof belongs to the clerk, which he is then selling for the firm, there is no consideration for the promise.—*Lamar v. Russel*, S. C. Ga., Jan. 25, 1887; 2 S. E. Rep. 467.

48. **CONTRACT—Consideration.**—When a note is given to be payable upon conditions specifically set forth in it that a railroad should be built and operated between specified points, no recovery can be had upon it, unless it be made clearly to appear that the condition had been fulfilled.—*Moore v. Campbell*, S. C. Ind., June 22, 1887; 12 N. E. Rep. 495.

49. **CONTRACT—Master and Servant—Implied Assent.**—Where a servant demands increased wages under a threat of leaving, and an answer is promised in a few days, but is not given for several months, when the master agrees to increase the wages from that date, an

assent to the demand from the date when it was made cannot be implied.—*Rayson v. Berkeley, etc. Co.*, S. C. S. Car., March 19, 1887; 2 S. E. Rep. 119.

51. CONTRACT—Services—Relationship.—A presumption arises against a promise to pay for services rendered by a grandchild, taken by the grandfather into his family and treated in all respects as one of the family.—*Dodson v. McAdams*, S. C. N. Car., May 21, 1887; 2 S. E. Rep. 453.

52. CONTRACT—Standing Grain—Title.—Where, by contract, standing millet is to be cut and stacked and then measured and paid for, the title does not pass till it has been measured and paid for.—*Hughes v. Wiley*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 269.

53. CONVERSION—Lien—Tender—Corporation—Evidence.—One who holds a lien on property of which he has possession, and claims much more than he is entitled to as a condition of surrendering possession, is liable for a conversion, and a tender of the amount actually due is not necessary. What is sufficient *prima facie* evidence of a mortgage by a corporation.—*Hamilton v. McLaughlin*, S. J. C. Mass., July 1, 1887; 12 N. E. Rep. 424.

54. CORPORATION—Contract Before Incorporation.—A note given for property in the name of a corporation by its selected president, after its articles of incorporation had been signed, but had not been filed, with the knowledge of all the promoters, may be sued on when the property has gone into the possession of the company.—*Paxton, etc. Co. v. First Nat. Bk.*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 271.

55. CORPORATIONS—Contract of Promoters—Acquiescence.—A corporation may adopt a contract made with its promoters just as it could have made the original contract. So it may adopt a contract made for the corporation by one director with another by knowledge and consent thereto, and by keeping the property so acquired.—*Battelle v. Northwestern, etc. Co.*, S. C. Minn., June 13, 1887; 33 N. W. Rep. 327.

56. CORPORATION—Municipal Corporation—Railroad—Watchman.—In Ohio, municipal corporations have no right under any statute to require, by ordinance, railroads to keep a watchman at points where the railroad crosses a street, and they have no such right independent of statute.—*Village of Ravenna v. Pennsylvania, etc. Co.*, S. C. Ohio, April 26, 1887; 12 N. E. Rep. 445.

57. CORPORATIONS—Records—Stockholders.—The books, records and minutes of a corporation are *prima facie* evidence of its organization and existence, and that a party is a stockholder, and of the state of his account relative to his stock.—*Glenn v. Orr*, S. C. N. Car., May 27, 1887; 2 S. E. Rep. 538.

58. COUNTY BOARD—Collateral Attack—Statutes.—Judgments and proceedings of county boards relating to gravel roads cannot be collaterally attacked unless they are absolutely void. Construction of Indiana statutes relative to county bonds and gravel roads construed.—*Streed v. Cox*, S. C. Ind., June 21, 1887; 12 N. E. Rep. 481.

59. COURTS—Jurisdiction.—The "Cherokee outlet" in the Indian Territory, is within the jurisdiction of the United States district court of Kansas, so placed by act of congress, and not within the jurisdiction of the United States district court, for the western district of Arkansas.—*United States v. Soule*, U. S. C. C. (Kan.), 1887; 30 Fed. Rep. 918.

60. COURTS—Jurisdiction—District—Demand—Fraud.—Under the act of March 3, 1887, a federal court has jurisdiction if the aggregate demand exceeds \$2,000, although made up of several and separate items, and acquired by assignment to plaintiff. Federal courts have, in proper cases, the same jurisdiction conferred by the statute of the State on State courts.—*Bernheim v. Bernheim*, U. S. C. C. (Ga.), April 22, 1887; 30 Fed. Rep. 885.

61. COVENANT—Subletting—Signs.—An agreement to let the sign of a third person to remain on the outer

wall of the building is a license, not a lease, and does not infringe a covenant against subletting. A lease of the first floor of a building includes the front wall thereof.—*Lovelle a. Strahan*, S. J. C. Mass., June 3, 1887; 12 N. E. Rep. 401.

62. COVERTURE—Trust—Statute of Frauds.—Where a parol trust has been executed it is not affected by the statute of frauds, and a married woman who has availed herself of such a trust cannot, by reason of her coverture, defeat her conveyances made in pursuance thereof.—*Strenger v. Montgomery*, S. C. Ind., June 15, 1887; 12 N. E. Rep. 474.

63. CRIMINAL LAW—Accomplice—Evidence.—The appellate court cannot set aside a judgment of conviction merely because it rests on the uncorroborated testimony of an accomplice.—*State v. Prater*, S. C. S. Car., February 28, 1887; 2 S. E. Rep. 108.

64. CRIMINAL LAW—Admissions.—Sworn statements of the accused made before a magistrate, where the accused was sworn at his own request, are admissible in evidence at his trial, under North Carolina law.—*State v. Ellis*, S. C. N. Car., May 9, 1887; 2 S. E. Rep. 525.

65. CRIMINAL LAW—Appeal—Record.—A transcript of the evidence alone is insufficient in an appeal in a criminal case.—*State v. Cash*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 283.

66. CRIMINAL LAW—Bastardy—De Facto Officer—Leading Questions.—The jurisdiction of the circuit court in a bastardy proceeding is not affected by the question, whether the committing magistrate was a *de jure* officer, he being a *de facto* officer. It is largely in the discretion of the trial court to allow leading questions in the direct examination, especially when the party is an unwilling witness.—*Baker v. State*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 52.

67. CRIMINAL LAW—Bigamy—Evidence.—In an indictment for unlawful cohabitation under United States laws, where it is proved that defendant was lawfully married to a woman, who bore him children, and that he was in the habit of visiting her and had remained over night in her house, it is not necessary to establish sexual intercourse with her to establish the relation of husband and wife.—*United States v. Clark*, S. C. Utah, June 20, 1887; 14 Pac. Rep. 288.

68. CRIMINAL LAW—Bigamy—Unlawful Cohabitation—Appearance.—The United States law about unlawful cohabitation aims at the unlawful example as appearance, as well as the actual continuance of the polygamous relation, and actual sexual connection is not essential to guilt, so the conduct of a defendant and his statements of disregard of and contempt for the law are material evidence.—*United States v. Smith*, S. C. Utah, June 20, 1887; 14 Pac. Rep. 291.

69. CRIMINAL LAW—Dying Declarations—Alibi.—A declaration as to the mode by which he came to his death made by a dying man a few moments before he died, and about the same time as he said he was going to die, is admissible as a dying declaration. An *alibi*, like every defense not arising out of the *res gestae*, must be proved by a preponderance of evidence.—*People v. Lee Sare Bo*, S. C. Cal., June 28, 1887; 14 Pac. Rep. 310.

70. CRIMINAL LAW—False Pretenses—Attempt—Information.—An information for attempting to obtain personal property by false pretenses, is not insufficient, because it does not expressly state that the defendant failed in the effort.—*State v. Decker*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 283.

71. CRIMINAL LAW—Fine—Imprisonment—Certiorari—Bail.—In North Carolina, both fine and imprisonment cannot be inflicted for slandering an innocent woman. Where *certiorari* is adopted instead of appeal, the defendant is entitled to bail till the *certiorari* is decided.—*State v. Walters*, S. C. N. Car., May 30, 1887; 2 S. E. Rep. 539.

72. CRIMINAL LAW—Forcible Entry—Proof.—Testimony by the prosecuting witness, partly confirmed by his wife, that defendants chased him from a ditch which divided his land from the defendants, and which he

ordered them to leave nearly to his house, will warrant a verdict of guilty of forcible entry.—*State v. Talbot*, S. C. N. Car., April 11, 1887; 2 S. E. Rep. 148.

73. CRIMINAL LAW—Indictment—False Pretenses.—Under Iowa law, an indictment for obtaining the signature of a person to a chattel mortgage charges no crime, when it does not charge a delivery of the mortgage.—*State v. McGinnis*, S. C. Iowa, June 14, 1887, 33 N. W. Rep. 338.

74. CRIMINAL LAW—Indictment—Amendment of Statute.—Acts of North Carolina, 1855, ch. 66, amending code of North Carolina, § 965, par. 6, prescribes a new and different offense, and an indictment charging, in the terms of the old law, an offense, and not averring the offense to have been committed prior to the ratification of the amendment, is bad.—*State v. Massey*, S. C. N. Car., May 21, 1887; 2 S. E. Rep. 445.

75. CRIMINAL LAW—Justifiable Homicide.—An officer cannot kill one attempting to rescue a prisoner, unless there is a necessity, and the jury is to determine from the evidence whether or not there was a necessity.—*State v. Brand*, S. C. N. Car., May 27, 1887; 2 S. E. Rep. 460.

76. CRIMINAL LAW—Murder—Indictment—Defects—Verdict.—A verdict of murder in the second degree, when one is tried on the theory of murder in the first degree, does not cure a defect in the indictment in not properly describing murder in the first degree.—*Redus v. People*, S. C. Colo., June 15, 1887; 14 Pac. Rep. 323.

77. CRIMINAL LAW—New Trial—Newly-discovered Evidence.—A new trial will not be granted for newly-discovered evidence, which is merely cumulative, and no good reason is shown for not producing it before.—*People v. Peacock*, S. C. Utah, June 29, 1887; 14 Pac. Rep. 332.

78. CRIMINAL LAW—Rape—Marriage—Adultery.—Upon an information charging rape, the defendant cannot be convicted of adultery. The prosecuting witness can testify as to her marriage.—*State v. Hooks*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 57.

79. CRIMINAL LAW—Verdict—Counts—New Trial.—A verdict of guilty on one count with no allusion to the other counts is equivalent to an acquittal on the other counts, and the defendant, if a new trial is granted, cannot be tried on those counts.—*State v. McNaught*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 377.

80. CRIMINAL PRACTICE—Absence of Defendant.—When a person is on trial for an offense punishable by death or imprisonment in the State prison, it is reversible error for the court, in the absence of the accused, to recall the jury and give them further instructions.—*Roberts v. State*, S. C. Ind., June 23, 1887; 12 N. E. Rep. 500.

81. CRIMINAL PRACTICE—Bill of Exceptions—Statute.—In Indiana, a prosecuting attorney has no right, by agreement, to extend the time for filing a bill of exceptions beyond the period prescribed by statute.—*Bartley v. State*, S. C. Ind., June 23, 1887; 12 N. E. Rep. 503.

82. CRIMINAL PRACTICE—Continuance.—It will be presumed that the court properly overruled a motion for continuance on the ground of sickness of counsel, when a continuance on that ground was granted at a former term, and the indictment was formed fifteen months prior thereto.—*State v. Stegner*, S. C. Iowa, June 15, 1887; 33 N. W. Rep. 340.

83. CRIMINAL PRACTICE—Evidence—Embezzlement—Statute—Appeal—Weight of Evidence.—If, in a criminal case, there is evidence fairly tending to support the verdict on every point, the verdict will not be disturbed on mere weight of evidence. Construction of Indiana statute relating to the crime of embezzlement, and indictments framed under such statutes.—*Ritter v. State*, S. C. Ind., June 23, 1887; 12 N. E. Rep. 501.

84. CRIMINAL PRACTICE—New Trial—Cumulative Evidence.—The accused, convicted of rape, moved for a new trial on the ground of newly-discovered evidence. The prosecutrix, on the trial, had made conflicting statements as to who was the author of the outrage.

The new evidence went to show that she had pointed out as guilty, at the time of the outrage, another man than defendant: *Held*, that such evidence was cumulative and not ground for a new trial.—*State v. Starnes*, S. C. N. Car., May 16, 1887; 2 S. E. Rep. 447.

85. CUSTOMS DUTIES—Animals Imported for Breeding Purposes—Exemption.—Animals suitable for breeding purposes are exempt from duty if imported for those purposes, not if imported for sale and profit.—*United States v. Eleven Horses*, U. S. C. C. (Ind.), June 2, 1887; 30 Fed. Rep. 916.

86. DAMAGES—Trespass.—Plaintiff sued defendant in trespass for injury to plaintiff's leasehold interest in a store rented from defendant, by the destruction of his adjoining store: *Held*, that plaintiff could recover damages arising after the commencement of the suit and up to the end of the tenancy.—*Conlon v. McGraw*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 338.

87. DEED—Description—Plat.—Where land is conveyed according to a plat, the distances marked on the plat must give way to the monuments and natural boundaries also found on the plat.—*Nicola v. Schneiderhan*, S. C. Minn., June 1, 1887; 33 N. W. Rep. 33.

88. DEED—Title Conveyed—Limitations.—A deed purporting to convey the entire interest of the grantor is not limited by an allusion to a contract with a third party, from whom he expects to get a quitclaim, when the allusion is simply made to more particularly describe the premises.—*Grant v. De Lamort*, S. C. Cal., June 30, 1887; 14 Pac. Rep. 314.

89. DESCENT AND DISTRIBUTION—Rights of Remaindermen.—A testator made his wife tenant for life, and gave her the disposition of the fee to the extent of reimbursing herself for all necessary payments made by her for the benefit of the estate and for her support. She was also executrix. On her settlement in that capacity it showed a balance in her favor, and the real estate was, at her death, found intact: *Held*, the balance due her as executrix, belonged to the remainder men, as it did not appear that she had any separate estate, or that if she had she had used it in favor of the estate.—*In re Howell v. Blindbury*, S. C. Mich., June 16, 1887; 12 N. W. Rep. 391.

90. DOWER—Devise in Lieu of—Land in Another State.—*Held*, that Pub. St. Mass., ch. 127, § 20, providing that the widow shall not be entitled to her dower, in addition to the provisions of her deceased husband's will, unless such plainly appears to have been the intention of testator, did not apply to land out of the State, and that upon the sale of lands in Minnesota, whose laws provide that the widow have dower in addition to the provisions in the husband's will, unless a contrary intention is expressed by said testator, the widow was entitled to one-third of the proceeds, but was to contribute out of such proceeds, with the legatees under the will, to the payment of debts secured by mortgage upon the Massachusetts lands.—*Staigg v. Atkinson*, S. J. C. Mass., June 26, 1887; 12 N. E. Rep. 334.

91. DIVORCE—Alimony.—Where the evidence shows that defendant owns a house and lot worth \$1,500 and \$200 in money, is 68 years old and can earn only \$6 a week, the plaintiff, the wife, in a divorce suit, is not entitled to more than the \$100 already received as temporary alimony.—*Ensler v. Ensler*, S. C. Iowa, June 24, 1887; 33 N. W. Rep. 334.

92. EJECTMENT—Improvements—Tax-titles.—In order that the defendant may be allowed for his improvements in an ejectment suit, he must have made them while holding under color of title, which the holder of a certificate of purchase at a tax judgment sale has not, till the equity of redemption has expired.—*McLellan v. Onodi*, S. C. Minn., June 18, 1887; 33 N. W. Rep. 326.

93. EJECTMENT—Parties—Infant—Remaindermen.—A wife by deed acquired title to a lot, subject to a reservation to the grantor of certain described lands. The lot, at her death, went to the children subject to the husband's life estate. Ejectment was brought against

the husband and infants for premises included in the reservation. The wife had never claimed the premises, nor had the infants asserted title to them, or were in possession of them, while their answer denied expressly any interest in the lands demanded: *Held*, they were not bound by the acts of their father, and their joinder as defendants was not authorized by § 1503, code N. Y.—*Sisson v. Cummings*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 345.

94. ELECTIONS—Voters—Disfranchisement.—Under Kentucky laws, those convicted of crimes inconsistent with the common principles of honesty or humanity, which crimes connect the perpetrator of moral turpitude, are not allowed to vote.—*Anderson v. Winfree*, Ky. Ct. App., May 19, 1887; 4 S. W. Rep. 351.

95. EMINENT DOMAIN—Damages—Rule.—Where several lots are used as one farm, the damages for condemning property must be considered relative to the whole, though only a part of one lot is taken, and the value of the farm with and without the railroad may be shown.—*Cedar Rapids, etc. R. Co. v. Ryan*, S. C. Minn., May 12, 1887; 14 Pac. Rep. 35.

96. EMINENT DOMAIN—Damages—Easement.—In a proceeding to condemn lands for a railroad the commissioners can only award damages in money, and cannot consider an agreement to give the owner a right of way over land of the railroad in reduction of damages.—*Burlington, etc. R. Co. v. Schweikart*, S. C. Colo., June 15, 1887; 14 Pac. Rep. 329.

97. EASEMENT—Drainage—Severance.—When a drainage ditch exists through several tracts of land owned by one person, an easement therefor exist after the tracts are conveyed to different owners.—*Hair v. Downing*, S. C. N. Car., May 21, 1887; 2 S. E. Rep. 520.

98. EMINENT DOMAIN—Streets—Railroad—Constitutional Law.—The legislature can authorize the construction of a railroad along the streets of a city, and the lot owners have no claim for damages if they are not deprived of a reasonable use of the street. A railroad can elevate its track above the surface, wherever the nature of the country makes it necessary or convenient.—*Buften v. Short Route, etc. R. Co.*, Ky. Ct. App., May 21, 1887; 4 S. W. Rep. 332.

99. EQUITY—Mistake of Law.—Equity will sometimes relieve from mistakes of law, when defendant has thereby gained an unconscionable advantage over the plaintiff, who is blameless. In general, relief will be afforded by reformation on account of the mistake of one party only, when the parties can be put *in statu quo*.—*Benson v. Markol*, S. C. Minn., May 21, 1887; 33 N. W. Rep. 38.

100. EQUITY—Parties—Will—Executors.—Where remaindermen authorized arbitrators to settle their disputes and to pass upon the will of their father, and to sell the property and divide the proceeds, and the arbitrators do so, confirming the will: *Held*, that in a suit by the sole devisee under the will against the arbitrators for the sum due him, the executor of the father is a necessary party.—*Green v. Iredell*, S. C. S. Car., April 21, 1887; 2 S. E. Rep. 495.

101. EQUITY—Reformation of Deed—Laches.—A deed will be reformed in equity, even after the lapse of twenty-two years, when the evidence shows that a mistake had been committed and had been participated in by both parties for many years. Delay of twenty-two years in demanding a balance of purchase money, is laches.—*Kellogg v. Chapman*, U. S. C. C. (Neb.), May 9, 1887; 30 Fed. Rep. 882.

102. EQUITY—Jurisdiction—Executors and Administrators—Account.—To maintain a bill in equity against an executor, for an account of proceeds of real estate sold under a power in the will, it must appear that proceedings have been taken in the probate court to compel the rendering of an account, and the bill must allege that the executor has not given a special bond to the probate court to account for proceeds of real estate sold.—*Ammidown v. Kinsey*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 365.

103. EQUITY—Jurisdiction—Nuisance.—Where a clear case for the intervention of a court of equity is made out, to abate a nuisance, such court has jurisdiction, though the controlling question is the location of a boundary line, and that defendant in ejectment would be entitled to three trials before as many juries.—*Wilmarth v. Woodcock*, S. C. Mich., June 16, 1887; 33 N. W. Rep. 400.

104. ESTOPPEL—Bond—Power of Officer.—A liquor dealer and his bondsmen are estopped from denying the validity of their bond for payment of his tax therefor, on the ground that the town commissioners, who could impose such tax, had no authority to take a bond.—*Town of Hendersonville v. Price*, S. C. N. Car., April 25, 1887; 2 S. E. Rep. 155.

105. EVIDENCE—School District—Incorporation—Official Certificates.—Official certificates of all the proceedings, resulting in the issue of bonds to build a school-house, are evidence of the corporate existence of the school district.—*State v. School District No. 7*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 265.

106. EXECUTION—Levy—Special Judgment.—When an execution is levied on certain property mentioned in the judgment obtained against certain property, and a claim is interposed, the levy should be dismissed, if the plaintiff fails to prove that the defendants ever had any title to that property.—*Alexander v. Baker*, S. C. Ga., Feb. 1, 1887; 2 S. E. Rep. 471.

107. EXECUTION—Sale—Judgments.—A sale on execution under a junior judgment divests the lien of prior judgments and confers a good title.—*Blohm v. Lynch*, S. C. S. Car., March 17, 1887; 2 S. E. Rep. 186.

108. EXECUTION—Sale—Separate Tracts.—Separate and distinct tracts of land should be sold separately under an execution, but a tract of land, on which the defendant lives, may be sold with other tracts which the defendant has added thereto.—*Hammett v. Farmer*, S. C. S. Car., April 21, 1887; 2 S. E. Rep. 507.

109. EXECUTOR—De Son Tort—Contract.—In California, an executor *de son tort* is not recognized. Contracts made with the executor by one who applied for letters as executor, which were issued, but who did not qualify, are valid.—*Bowden v. Pierce*, S. C. Cal., June 17, 1887; 14 Pac. Rep. 302.

110. EXECUTORS—Limitations—Defense.—It is the duty of an administrator to plead the statute of limitations; if he fails or refuses to do it, the heir or any interested party may set it up.—*McKinlay v. Gaddy*, S. C. S. Car., April 26, 1887; 2 S. E. Rep. 497.

111. FORCIBLE ENTRY AND DETAINER—Summons—Service of Complaint—Continuance.—A summons in a forcible entry and detainer case, which requires the defendant to answer in less than six days after its date, is not void. It must show in the return that a certified copy of the complaint was served on the defendant. A continuance, to make a proper service of the summons, does not come under the provision about continuances.—*Belts v. Flint*, S. C. Oreg., April 25, 1887; 14 Pac. Rep. 295.

112. FRAUD—Undue Influence—Spiritualism.—Where a party is old and infirm and relies on a spiritual medium for the conduct of his affairs, there is a presumption that a medium who obtains advantage over him in a contract has exercised undue influence.—*Conner v. Stanley*, S. C. Cal., June 21, 1887; 14 Pac. Rep. 306.

113. FRAUDULENT CONVEYANCE—Consideration—Dower.—A conveyance of land by a husband to his wife will not be set aside as fraudulent when the consideration therefor is a release of her dower in other lands, wherein her dower interest is worth many times the value of the land conveyed.—*German American Sav. v. Saenger*, S. C. Mich., June 6, 1887; 33 N. W. Rep. 361.

114. FRAUDULENT CONVEYANCE—Creditors.—A creditor, wishing to set aside a sale as fraudulent with reference to creditors, must remain a creditor throughout the litigation. If he is paid out of the mortgaged property with knowledge of the mortgage, he takes

subject thereto.—*Earle v. Burch*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 254.

115. FRAUDULENT CONVEYANCE—Husband and Wife—Consideration.—A conveyance of land by a husband to his wife for money given him by her for his own use, without any agreement as to compensation, is void as to his creditors, who have begun suit before the conveyance.—*Hanson v. Manley*, S. C. Iowa, June 17, 1887; 33 N. W. Rep. 357.

116. FRAUDULENT CONVEYANCE—Preference.—Where a debtor assigns his stock of goods to one creditor in payment of the debt and for a sum of money in excess thereof, the assignment act of South Carolina does not apply, and the sale cannot be set aside as a fraud on other creditors.—*Venner v. McGhee*, S. C. S. Car., March 11, 1887; 2 S. E. Rep. 113.

117. FRAUDULENT CONVEYANCE—Representations.—Where a father guarantees his son's faithful performance of duty to a corporation, and that son and another state that the father owned certain lands, which he had already conveyed by an unrecorded deed to those sons, and immediately thereafter conveys it to the other son, by agreement between the three: *Held*, that the land was subject to the claim of the corporation for the failure of the son employed to account to the corporation for money received for it.—*Davis S. M. Co. v. Dunbar*, S. C. App. W. Va., April, 9, 1887; 2 S. E. Rep. 91.

118. FRAUDULENT CONVEYANCE—Stock in Trade—Insolvency.—When a party sells all his stock in trade to another, who knows he is pressed for debts which he cannot pay, no inventory being taken, and the payment being cash and partly the assumption of mortgages on the goods, when the purchaser buys on speculation with no intention of going into the business, such sale is fraudulent as to creditors, though the debtor claims that the cash received will pay his debts.—*Redhead v. Pratt*, S. C. Iowa, June 21, 1887; 33 N. W. Rep. 382.

119. GARNISHMENT—Representations—Estoppel.—An attaching creditor cannot claim that the garnishee is estopped to claim by his answer that the mortgaged property was absorbed in paying the mortgaged debt, because he trusted the debtor, relying on the mortgagee's statement that the debt was paid.—*Sears v. Thompson*, S. C. Iowa, June 17, 1887; 33 N. W. Rep. 364.

120. GARNISHMENT—Rights Under Contract.—A debtor, though garnished, has a right to pay out money owing to his creditor to other parties in accordance with his contract with his creditor.—*Drake v. Leighton*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 61.

121. GIFTS—Delivery.—A gift of personal property, to carry the title, must be accompanied by delivery, as far as the subject is capable of delivery.—*Medlock v. Powell*, S. C. N. Car., April 18, 1887; 2 S. E. Rep. 149.

122. GIFT—Inter Vivos—Delivery.—A father invested \$2,000 in bonds for his daughter's benefit, but at her request kept them in his possession and under his control, he collecting the interest and remitting it to her. She never had possession of the bonds. *Held*, there was no delivery, and the transaction did not involve a valid gift *inter vivos*.—*Flanders v. Blandy*, S. C. Ohio, April 26, 1887; 12 N. E. Rep. 321.

123. GUARDIAN—Foreign Courts—Removal—Multifariousness.—A court has jurisdiction of a bill brought by wards to remove a guardian appointed by a court in another State, from which State he has removed, taking the trust funds with him, and such bill is not demurrable because four wards, children of the same parties, join therein as plaintiffs.—*Stallings v. Barrett*, S. C. S. Car., April 20, 1887; 2 S. E. Rep. 483.

124. GUARDIAN—Foreign—Ward—Sale of Realty.—A sale of realty of a ward, on the petition of a foreign guardian without the appointment of a next friend, will not be set aside without some grounds for equitable relief.—*Tate v. Mott*, S. C. N. Car., May 2, 1887; 3 S. E. Rep. 176.

125. HIGHWAYS—Re-survey—Parol Evidence.—Where a re-survey of a highway is ordered, all the record having been lost but the plat, parol evidence is

admissible to prove a divergence in the new survey, which is also shown by the plat.—*Ackerson v. Van Vliet*, S. C. Iowa, June 17, 1887; 33 N. W. Rep. 362.

126. HOMESTEAD—Sale—Exemption.—The proceeds of the sale of a homestead are not exempt from execution, unless it was the intention therewith to buy another homestead, which the claimant for exemption must prove.—*Huskins v. Hanlon*, S. C. Iowa, June 16, 1887; 33 N. W. Rep. 352.

127. INJUNCTION—Bond—Suit by State Officer.—State officers cannot sue as private individuals on a bond given in an injunction suit to restrain their action as such officers.—*Kinhead v. Benton*, S. C. Nev., June 27, 1887; 14 Pac. Rep. 294.

128. INJUNCTION—Jurisdiction.—Where the heirs and administrator of A bring suit against his widow in the circuit court of Iowa to determine her rights under an ante-nuptial contract, *held*, that the district court had jurisdiction, pending the action, to enjoin the heirs and administrator from interfering with her right of temporary homestead in land occupied by her and her husband as such during the marriage; and such jurisdiction is not affected by the fact that she asked for other relief to which she was not entitled.—*Collins v. Collins*, S. C. Iowa, June 21, 1887; 33 N. W. Rep. 442.

129. INSANITY—Estate—Answer of Committee—Accounting.—The answer of the committee of a lunatic as to the amount due him, in an action to subject certain lands to the liens thereon, may be amended on petition for that purpose, increasing the sum due before the fund is distributed.—*Calloway v. Dinmore*, S. C. App. Va., May 5, 1887; 2 S. E. Rep. 517.

130. INSOLVENCY—Attachment—Statute.—Where, under the statute of Tennessee, an attachment is issued and levied upon the property of a deceased non-resident of the State, the attachment creditor must share *pro rata* with other creditors, if, pending the attachment proceeding, the administrator of the deceased suggests the insolvency of the estate.—*Barchus v. Peters*, S. C. Tenn., May 3, 1887; 4 S. W. Rep. 833.

131. INSOLVENCY—Partnership—Prolongation of—In Commendam—Statute.—In Louisiana, all the rights of an insolvent who makes a cession pass to the syndic. If, in Louisiana, a partnership is prolonged during its continuance, such prolongation does not create a new partnership. Rights in Louisiana of a partner in *commendam*.—*Arnold v. Danziger*, U. S. C. C. (La.), Jan. 13, 1887; 30 Fed. Rep. 896.

132. INSTRUCTIONS—The charge of the court to the jury should be construed as a whole, and when so construed, if it is found correct, it meets all the requirements of the law.—*Hunnicut v. State*, Tex. Ct. App., March 9, 1887; 4 S. W. Rep. 883.

133. INSURANCE—Life Insurance—Agency.—Where the local agent of a life insurance company agrees to advance the premium for the assured, and in pursuance of that agreement a policy for the assured is mailed to the agent, the policy takes effect from the time it is placed in the mail.—*Yonge v. Equitable, etc. Co.*, U. S. C. C. (Tenn.), May 12, 1887; 30 Fed. Rep. 902.

134. INSURANCE—Fire—Loss Before Contract.—A policy of fire insurance, issued after the loss, which was then known to the insured, is void.—*Wales v. New York, etc. Ins. Co.*, S. C. Minn., June 14, 1887; 33 N. W. Rep. 322.

135. INSURANCE—Life—Proof of Death—Waiver—Forfeiture.—Proof of death of the insured is waived when the company denies all liability on the policy. Forfeiture of a policy for non-payment of the premium cannot be declared when the time for payment has been extended and the insured dies in the meantime.—*Kansas Protect. U. v. Whitt*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 375.

136. INSURANCE—Proof of Loss—Waiver.—Where proof of loss under a fire insurance policy is not made within the prescribed time, but before the time has elapsed the company asserts its non-liability on the ground that a provision against alienation has been violated, it thereby waives the requirement of proof of

loss.—*Commercial, etc. Co. v. Scammon*, S. C. Ill., June 17, 1887; 12 N. E. Rep. 325.

137. INSURANCE—Reports—Penalties.—A complaint against a foreign insurance company for not filing reports must state that the company is licensed to do business in Wisconsin, as the law does not apply to others.—*State v. U. S., etc. Assn.*, S. C. Wis., June 1, 1887; 33 N. W. Rep. 90.

138. INTOXICATING LIQUORS—Laws—Charter.—By the charter of Window, it was not intended to abrogate there the general law prohibiting the sale of intoxicating liquors without a license.—*State v. Nolan*, S. C. Minn., May 13, 1887; 14 Pac. Rep. 36.

139. INTOXICATING LIQUORS—Local Option—Statute—Election.—Construction of local option law of Texas. The law requiring the election to be ordered at the first term after the filing of the petition. When an election may be ordered at a special session of the commissioners' court.—*Ex parte Subbitt*, Tex. Ct. App., April 23, 1887; 4 S. W. Rep. 894.

140. INTOXICATING LIQUORS—Selling to Minor—Evidence.—In a prosecution for selling liquor to a minor, it is error to permit a witness to be asked whether, in his opinion, a person of ordinary discernment would, from his appearance, take the purchaser to be a minor.—*Koblenchlag v. State*, Tex. Ct. App., April 13, 1887; 4 S. W. Rep. 888.

141. JOINT TENANTS—Occupancy—Profits.—Where the property is such as to admit the use and occupation by several, and one tenant in common uses less than his share of the common property, and the others are not hindered from using their just share, such tenant does not receive more than comes to his just share and proportion in the meaning of ch. 100, § 14, of the code, and is not accountable to his co-tenants for the profits of the portion used by him.—*Dobson v. Hays*, S. C. App. W. Va., April 9, 1887; 2 S. E. Rep. 415.

142. JUDGMENT—Confusion—Married Woman—Renewal of Execution.—Though a judgment against a married woman prior to 1868 was void, yet, if on application to renew the execution, the defendant fails to raise the objection, the validity of the judgment becomes *res adjudicata*.—*Crenshaw v. Julian*, S. C. S. Car., March 14, 1887; 2 S. E. Rep. 133.

143. JUDGMENT—Court—Jurisdiction—Amendment of Return—Purchase.—An amendment of the constable's return to show the jurisdiction of the court may be allowed after judgment, and a purchaser after the attachment takes subject to the judgment when rendered.—*Allison v. Thomas*, S. C. Cal., June 21, 1887; 14 Pac. Rep. 309.

144. JUDGMENT—Lien—Homestead—Abandonment—Dormant Lien—Statute.—Construction of Civil Code of Nebraska. Where, under it, the lien of a judgment upon land attaches. Homestead law of Nebraska. While land is legally occupied as a homestead, the lien of an antecedent judgment is dormant, but it revives when the homestead is abandoned.—*Kellerman v. Aultman*, U. S. C. C. (Neb.), May 12, 1887; 30 Fed. Rep. 888.

145. JUDGMENT—Lien—Vendor.—A judgment in the district court is a lien on the debtor's interest in land which he has sold but has not deeded, and for which he has not received all the purchase money.—*Courtney v. Parker*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 262.

146. JUDGMENT—Setting Aside—Equity—Corruption of Judge.—Facts stated which are decided *not* to show the corruption of a judge, nor to authorize the setting aside in equity of a judgment.—*Newton v. Julian*, U. S. C. C. (Colo.), May 24, 1887; 30 Fed. Rep. 891.

147. JURY—Pannel—Challenge—Statute.—In Kentucky, each defendant is entitled to have a full pannel of jurors tried and found competent before he is required to exercise his right of peremptory challenges.—*Jenkins v. Commonwealth*, Ky. Ct. App., June 11, 1887; 4 S. W. Rep. 816.

148. JUSTICES OF THE PEACE—Garnishment—Appeal—

Stipulations.—Justices of the peace have jurisdiction to try the issue raised by a denial of the validity of a mortgage claimed by the garnishee. In such cases, an appeal lies to the superior court of Denver. A stipulation made inadvertently by counsel may be relieved against, but only by setting it all aside.—*Welsh v. Noyes*, S. C. Colo., June 15, 1887; 14 Pac. Rep. 317.

149. LANDLORD AND TENANT—Questions of Fact—Trial by Jury.—In a proceeding to eject a tenant before a justice of the peace, a party cannot claim a jury trial as a constitutional right, and the findings of fact by the justice are conclusive on appeal in the circuit and supreme courts.—*Frazer v. Bratton*, S. C. S. Car., March 19, 1887; 2 S. E. Rep. 125.

150. LANDLORD AND TENANT—Release of Tenant.—When a tenant has assigned his lease to B, from whom the landlord collects rent and alters the premises to suit B, and makes no claim during this time on the original tenant, and on B's leaving buys his personal property and takes possession, the jury is justified in finding that the original tenant was released.—*Cotton v. Gorham*, S. C. Iowa, June 7, 1887; 33 N. W. Rep. 76.

151. LARCENY—False Pretenses.—In order to render one who obtains property lawfully liable as guilty of theft, it must appear that he obtained such possession by deceiving the owner, or that at that time he had the intention of appropriating the property to his own use.—*Porter v. State*, Tex. Ct. App., April 16, 1887; 4 S. W. Rep. 889.

152. LIMITATIONS—Action—Parties—Amendment.—Where a suit for negligence is brought against the A company, which had sold out to the B company prior to the accident, and the summons is served on an officer of the A company, who is also vice president of the B company, and the answer is verified by an officer of the B company, the answer will be held to be that of the B company, and when, by amendment, the B company is made the defendant, the statute of limitations will cease to run from the filing of the suit.—*Heckman v. Louisville, etc. R. Co.*, Ky. Ct. App., May 21, 1887; 4 S. W. Rep. 342.

153. LIMITATIONS—Claims Against Estates.—Presentation of a claim against an estate, which is then withdrawn, does not interfere with the running of the statute of limitations, which requires it to be filed within two years after the cause of actions accrues.—*Morse v. Clark*, S. C. Colo., June 15, 1887; 14 Pac. Rep. 327.

154. LIMITATIONS—Perfecting Right of Action.—Statutes of limitations are statutes of repose, and should be construed to advance that policy, and where preliminary action on the part of the claimant is necessary prior to bringing a suit on the claim, the statute will begin to run in a reasonable time after he could have perfected his right, which time can in no case exceed the time allowed for bringing such action.—*Atchison, etc. R. Co. v. Burlingame Tp.*, S. C. Kan., June 11, 1887; 14 Pac. Rep. 271.

155. LIMITATIONS—Taxation—Tax-title.—Construction of Kansas statute of limitations, so far as it relates to the subject of taxation, tax-titles and the effect upon operation of the statute of the absence of the party from the State.—*Watkins v. Reed*, U. S. C. C. (Kan.), 1887; 30 Fed. Rep. 908.

156. LIMITATION OF ACTIONS—Tax-titles.—Until the right of a holder of a tax-title is disputed by the owner of the land, which is done by taking or holding possession of the land, the statute of limitations does not begin to run against him.—*Francis v. Griffin*, S. C. Iowa, June 15, 1887; 33 N. W. Rep. 345.

157. MALICIOUS PROSECUTION—Probable Cause—Legal Question.—In an action for malicious prosecution, it is for the court to determine whether a given state of facts constituted probable cause.—*Moore v. North, etc. R. Co.*, S. C. Minn., June 16, 1887; 33 N. W. Rep. 334.

158. MASTER AND SERVANT—Contract—Verdict.—A general verdict for a servant for wages, not exceeding the amount due him for the time he was laid off, is not in conflict with a special verdict that the contract of employment was not for any definite period.—*Tilford v.*

Fairfield M. Co., S. C. Iowa, June 17, 1887; 33 N. W. Rep. 364.

159. MASTER AND SERVANT—Fellow-servant.—A yard-master of a railroad company is a fellow-servant of a car-coupler, though he has the authority to discharge the car-coupler.—*Webb v. Richmond, etc. R. Co., S. C. N. Car.*, May 21, 1887; 2 S. E. Rep. 446.

160. MASTER AND SERVANT—Fellow-servants—Negligence—Respondent Superior.—If a repairer goes under a train to inspect, and while there is injured by the train backing by order of the conductor, he being guilty of negligence, the company is liable on the principle of respondent superior. It is a question for the jury, whether the train was under charge of the conductor for whom the company is responsible, or of the yard-master for whose negligence it is not responsible.—*Ritts v. Louisville, etc. Co., Ky. Ct. App.*, June 9, 1887; 4 S. W. Rep. 796.

161. MASTER AND SERVANT—Fellow-servants.—A station agent, whose duty it is to attend to the switches, and whose express duty it is to see that the main track is kept clear and unobstructed for the passage of trains, and to give timely notice to those in charge of approaching trains, and be out at the station, and know that everything is right when trains are passing, is a fellow-servant of a brakeman on the same road, who has been injured by a collision near the agent's station, and, to hold the company responsible, such agent must be shown to have been incompetent.—*Fouer v. Chicago, etc. R. Co., S. C. Wis.*, June 22, 1887; 33 N. W. Rep. 433.

162. MASTER AND SERVANT—Negligence—Contributory.—A servant, in removing timber from a pile under orders of a foreman, was injured by the fall of another pile. Another intervening pile interfered with the servant's view, and there was testimony that the foreman had been told that the pile which fell was dangerous: Held, that negligence of the master and contributory negligence by the servant were questions to be submitted to the jury.—*Baldwin v. St. Louis, etc. R. Co., S. C. Iowa*, June 15, 1887; 33 N. W. Rep. 356.

163. MASTER AND SERVANT—Negligence—Car-couplings.—Since railroads are required to receive cars from other roads by law, it is not negligence per se to receive a car not provided with suitable couplings, nor to put such a car provided with different couplings from those it uses, on its track without notice thereof to its brakeman.—*Simms v. South Carolina R. Co., S. C. S. Car.*, April 30, 1887; 2 S. E. Rep. 486.

164. MASTER AND SERVANT—Perils of Employment—Three-link Coupling.—A brakeman must be presumed to assume the risk of coupling cars with the three link coupling, since it is so much used.—*Darracutt v. Chesap. & O. R. Co., S. C. App. Va.*, May 5, 1887; 2 S. E. Rep. 511.

165. MECHANIC'S LIEN—Preparation of Material—Proceeds.—When a mechanic prepares stone for a building under a contract to be paid by installments, he is entitled to a lien on the property for the stone prepared, but not delivered, when the owner has notified him that he cannot comply with his contract. The proceeds of the sale of the property, after satisfying the lien, go to the purchaser of the premises at a prior attachment sale.—*Trammell v. Mount, S. C. Tex.*, May 8, 1887; 4 S. W. Rep. 377.

166. MECHANIC'S LIEN—Two Buildings—Bill.—In a suit to enforce a mechanic's lien against two buildings, the bill of particulars need not specify what lumber was sold for each building.—*Bowman Lumber Co. v. Newton, S. C. Iowa*, June 21, 1887; 33 N. W. Rep. 377.

167. MORTGAGE—Collateral Security—Failure of Consideration.—One who takes a note secured by mortgage as collateral security, and forecloses the mortgage after the note is barred, can be required to account for the proceeds of the sale when the consideration for the note has failed.—*Dearman v. Trimmer, S. C. S. Car.*, April 29, 1887; 2 S. E. Rep. 501.

168. MORTGAGE—Extension of Time—Effect.—A purchaser of a lot subject, with other lots, to a mort-

gage extended, without consideration, by verbal agreement between mortgagor and mortgagee, cannot restrain foreclosure on his lot, on the ground that the delay in foreclosure has diminished the value of the mortgaged property, and that the mortgagor is insolvent. His remedy is to pay the mortgage and be subrogated to the rights of the mortgagee.—*Case v. O'Brien, S. C. Mich.*, June 9, 1887; 33 N. W. Rep. 403.

169. MORTGAGE—Foreclosure—Insolvency of Defendant.—When, in a foreclosure suit, the insolvency of the defendant in possession is shown, the court should appoint a receiver or take a bond for the payment of the rents, profits and damages.—*Durant v. Crowell, S. C. N. Car.*, May 30, 1887; 2 S. E. Rep. 541.

170. MORTGAGE—Foreclosure—Parties—Limitations.—An action to foreclose a mortgage should be brought against the heirs of the mortgagor, and his administrator is not a necessary party, and the heirs can plead the statute of limitations.—*Fraser v. Bean, S. C. N. Car.*, April 25, 1887; 2 S. E. Rep. 159.

171. MORTGAGE—Fraudulent Acknowledgment—Ratification—Lien—Claimant.—Where a mortgage on a homestead is executed and acknowledged by a husband and by one who personates his wife, and six weeks afterwards the wife signs an instrument attempting to ratify the mortgage: Held, that the mortgage was incapable of ratification, and created no lien on the homestead, and the question can be raised by any one claiming a lien on the homestead.—*Hovell v. McCice, S. C. Kan.*, June 11, 1887; 14 Pac. Rep. 237.

172. MORTGAGE—Tender—Release.—A tender of the amount of the mortgage debt discharges the lien of the mortgage under South Carolina law, though, in a suit to foreclose the mortgage, including other debts wrongfully therein, the tender is not kept good, and the creditor is not entitled to a decree of foreclosure, but to a judgment for all the money due him.—*Salinas v. Ellis, S. C. S. Car.*, March 19, 1887; 2 S. E. Rep. 121.

173. MUNICIPAL CORPORATION—Bridges—Information.—An information lies against a town for not keeping a bridge on a public highway in repair, and it need not allege that defendant is a duly organized town, which is bound by law to keep the bridge in repair.—*Town of Saukville v. State, S. C. Wis.*, June 1, 1887; 33 N. W. Rep. 88.

174. MUNICIPAL CORPORATION—Orders—Equities.—Orders of a village upon its treasurer in payment for work done are not negotiable instruments, and are subject to all equities.—*Miner v. Vedder, S. C. Mich.*, May 5, 1887; 33 N. W. Rep. 47.

175. MUNICIPAL CORPORATION—Ordinances—Evidence.—It is sufficient that the journal of a city of the second-class shows, by the yeas and nays, that a majority of the council adopted it, and a note thereto so stating, is prima facie evidence that it was duly published. On appeal to a district court from a conviction of a violation of a city ordinance, the court will judicially notice the ordinance.—*Downing v. City of Miltonvale, S. C. Kan.*, June 11, 1887; 14 Pac. Rep. 281.

176. MUNICIPAL CORPORATIONS—Street Improvements—Damages.—A verdict that plaintiff was not injured by a change of grade of a street, is supported by proof that the liability of his lot to overflow was thereby removed.—*McCaik v. City of Burlington, S. C. Iowa*, June 15, 1887; 33 N. W. Rep. 346.

177. NEGLIGENCE—Contributory—Child—Jury—Damages.—Where the evidence is conflicting, the question whether a child 11 years old used proper care in passing over a dangerous railroad crossing, the question should be left to the jury. Testimony of the peculiar condition of her parents is admissible.—*Cooper v. Lake Shore, etc. R. Co., S. C. Mich.*, June 9, 1887; 33 N. W. Rep. 356.

178. NEGLIGENCE—Trespasser—Contributory Negligence.—A railroad company has a right to presume a clear track except at crossings, and owes no duty to a trespasser walking on its track except not to run over him after he has been discovered. It has a right to presume that he will take care of himself, unless it appears

that for any reason he is not in condition to do so. The company is only chargeable with liability for negligence in failing to avoid injuring him, and not negligence in failing to discover him.—*St. Louis, etc. Co. v. Monday*, S. C. Ark., June 18, 1887; 4 S. W. Rep. 782.

179. **NEGOTIABLE NOTE—Joint Indorsers.**—When a note has been indorsed by two persons jointly, and in an action upon it the plaintiff shows notice of the dishonor of the note to one of the indorsers only, he cannot have judgment against either. There must be a joint judgment or none at all.—*Seigman v. Gray*, S. C. Mich., June 16, 1887; 33 N. W. Rep. 510.

180. **ORDER—Acceptance—Conditional.**—An acceptance of an order to pay another money "out of funds that may be due me under our contract" is conditional, and dependent upon the contingency that any money becomes due thereunder.—*Rife v. Gercor*, S. C. App. W. Va., March 26, 1887; 2 S. E. Rep. 104.

181. **OFFICERS—County Treasurer—Funds—Note.**—A county treasurer who receives money in his official capacity and fails to pay it over on going out of office, is indebted to the county therefor, and the county supervisors can take his note therefor.—*County of Sac v. Hobbs*, S. C. Iowa, June 10, 1887; 33 N. W. Rep. 368.

182. **OFFICERS—Double Offices—Constitutional Law.**—A party elected clerk of a superior court may qualify as such, though he still holds tax-bills which are unpaid and which he has power to enforce, his term of office as sheriff having just expired.—*McNeill v. Somers*, S. C. N. Car., April 25, 1887; 2 S. E. Rep. 161.

183. **PATENTS—Shirt Bosoms.**—Patent No. 156,880, is sued to Robert Cluett in 1874, for improvements in shirt bosoms: *Held*, void for want of novelty.—*Cluett v. Clayton*, U. S. C. C. (N. Y.), June 7, 1887; 30 Fed. Rep. 921.

184. **PAYMENTS—Application—Surety—Mortgage.**—Where a mortgage, evidenced by four notes, on the first two of which there is a surety, is foreclosed, the proceeds of the sale may be first applied on the other two notes.—*Hanson v. Manley*, S. C. Iowa, June 17, 1887; 33 N. W. Rep. 357.

185. **PERJURY—False Swearing—Statute.**—Under the statutes of Texas, to make a false affidavit before the county clerk in an application for a marriage license, that the bride's parents consented to the marriage, is false swearing but is not perjury.—*Stecher v. State*, Tex. Ct. App., March 9, 1887; 4 S. W. Rep. 880.

186. **PLEADING—Parties—plaintiff.**—Under the statute, all parties interested may be joined as plaintiffs, whether the action is legal or equitable.—*Karle v. Burch*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 264.

187. **PLEADING—Killing Stock—Railroads.**—In an action for double damages for killing stock, the statement filed before the justice need not state that the point where the animal got on the track within the limits of an incorporated city or town, if the fact appears by necessary implication from the facts stated.—*Ringo v. St. Louis, etc. R. Co.*, S. C. Mo., May 16, 1887; 4 S. W. Rep. 306.

188. **POST OFFICE—Fraud—Fraudulent Post Office Orders.**—When a postmaster drew fraudulent orders on another post office, which, by his direction, were paid to a bank and subsequently remitted to him, the bank was held liable to the United States, because it did not disclose the fact that it was acting as agent of the drawer in collecting the orders.—*United States v. Stockgrowers' Nat. Bank*, U. S. C. C. (Colo.), May 4, 1887; 30 Fed. Rep. 912.

189. **PRACTICE—Contributory Negligence—Instructions.**—Where the question of the negligence of the defendant is closely involved with that of contributory negligence on the part of the plaintiff, the court may, in its instructions, submit the whole question as one issue.—*Scott v. Wilmington, etc. R. Co.*, S. C. N. Car., April 26, 1887; 2 S. E. Rep. 151.

190. **PRACTICE—Election of Form of Action.**—Plaintiff sued at law to recover moneys paid on assessments, which he claimed were void on account of irregularities: *Held*, that having made an election of one remedy he

was not entitled to a writ of *certiorari*.—*Mathias v. Mason*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 412.

191. **PRACTICE—Equity—Answer Treated as Cross-bill.**—Where plaintiff seeks, by suit in equity, to enjoin defendant from selling land under a deed of trust, and defendant, in his answer, prays that all matters in controversy between the parties be adjusted, and it appears that defendant has no right to sell the land under the deed of trust, but that plaintiff is in default for purchase money advanced plaintiff: *Held*, that the answer be treated as a cross-bill, and that a decree ordering the sale of the property, unless plaintiff repay the amount advanced in a certain time, did not go beyond the limits of the case made by the pleading.—*Atkins v. Edwards*, S. C. App. Va., May 3, 1887; 2 S. E. Rep. 435.

192. **PRACTICE—Equity—Dismissal.**—After part of the testimony has been taken and before the testimony is closed, a suit in equity at issue on replication cannot be dismissed.—*Goodrich v. Goodrich*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 412.

193. **PRACTICE—Evidence—Documents—Admissions.**—In an action for recovery of land with damages for detention, a statement of accounts between the parties, made by defendant relative to the profits from the land, is admissible.—*McMillan v. Baker*, S. C. N. Car., April 25, 1887; 2 S. E. Rep. 164.

194. **PRACTICE—Evidence—Facts Within Common Knowledge.**—The plaintiff's hand was injured while guiding cloths under the knives of a machine. At the trial of an action to recover damages for the injury, an expert was asked whether the danger of the operative's hand being drawn under the knives, if placed upon the cloth, would be obvious to an inexperienced operative. The question was excluded. *Held*, that the question was addressed to the common knowledge of the jury, and not to the special knowledge of an expert, and was properly excluded.—*Gilbert v. Guild*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 368.

195. **PRACTICE—Evidence—Master and Servant.**—Where the defense to an action for damages for injuries is that the injury was caused by disobedience to directions of a foreman, evidence that said foreman was a man of intemperate habits, that he had been discharged for getting drunk, but had been reinstated, is competent.—*Kean v. Detroit Rolling Mills*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 395.

196. **PRACTICE—Injunction—Nonsuit.**—A suit for an injunction, which has been refused and when the defendant has acquired no rights in the suit, may be dismissed by the plaintiff, but such nonsuit, under North Carolina laws, must be taken at a regular term of the court.—*Bynum v. Comrs. of Burke Co.*, S. C. N. Car., April 25, 1887; 2 S. E. Rep. 170.

197. **PRACTICE—Mortgage—Foreclosure—Infant Defendants.**—The failure to appoint a guardian *ad litem* for minor defendants in a suit to foreclose a mortgage, does not render a decree of foreclosure void. It is, at most, erroneous.—*Parker v. Stan*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 424.

198. **PRACTICE—Motion for New Trial—Vacation.**—When a consent order is taken that a motion for a new trial shall be taken by the judge and passed on by him within the next thirty days, in vacation, he may determine the motion at a subsequent term, and the party is not prejudiced by his failure to act within thirty days.—*Johnston v. Simmons*, S. C. Ga., Feb. 26, 1887; 2 S. E. Rep. 469.

199. **PRACTICE—Pleadings—Amendments.**—Where a replication is adjudged insufficient, but the petition contains the proper allegations on that question, the suit should not be dismissed, but the plaintiff should be allowed to amend his replication.—*Morris v. Lyon*, S. C. App. Va., May 5, 1887; 2 S. E. Rep. 515.

200. **PRACTICE—Railroads—Station Accommodations—Plaintiffs.**—An action against a railroad for not establishing a station house, as ordered by the railroad commissioners, must be brought in the name of the

State by the attorney-general.—*Bonham v. Columbia, etc. R. Co.*, S. C. S. Car., March 19, 1887; 2 S. E. Rep. 127.

201. PRACTICE—Trial by Court—Findings.—In Iowa, the findings in a case tried by the court without a jury will not be disturbed on appeal if there is evidence to sustain them.—*Swayne v. Waldo*, S. C. Iowa, June 7, 1887; 43 N. W. Rep. 73.

202. PRACTICE—Trial—Findings by Court.—Where a court tries questions of fact, a jury being waived, either party may request the court to state in writing the conclusions of fact found, separately from conclusions of law. If requested so to do, it is error for the court to refuse, and such error is not cured by assigning findings on overruling a motion for a new trial.—*Wiley v. Shars*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 418.

203. PRACTICE—Trial—Issues—Instructions.—Where a judge charges the issues agreed on, and the attorney examines them and comments on them to the jury, and makes no exceptions, he cannot object to them on appeal. When instructions have been asked under the issued, after a charge of the issued, if they remain undisposed of, the court must give those instructions or modify them to suit the new issues.—*Phifer v. Alexander*, S. C. N. Car., May 30, 1887; 2 S. E. Rep. 630.

204. PRACTICE—Trial—Issues—Instructions.—Where, in an action for damages caused by negligence, contributory negligence on the part of the plaintiff, the defendant is entitled to have that issue presented to the jury in the instructions.—*Kirk v. Atlanta, etc. R. Co.*, S. C. N. Car., May 27, 1887; 2 S. E. Rep. 536.

205. PRACTICE—Trial—Order of Evidence.—Where no abuse of discretion is shown in admitting evidence in rebuttal which was pertinent in chief, it is not error.—*Torrent v. Damm*, S. C. Mich., May 8, 1887; 33 N. W. Rep. 49.

206. PRACTICE—Trial—Verdict—Argument.—An objection that the verdict is indefinite and uncertain should be made at the time, that the court may cause it to be corrected. In his argument, an attorney may read special interrogatories to the jury, discuss the evidence bearing thereon, and discuss the proper answers thereto.—*Temcia v. Chicago, etc. Co.*, S. C. Iowa, June 21, 1887; 33 N. W. Rep. 370.

207. PRACTICE—Writ of Error—Time of Filing.—A writ of error must be filed in the supreme court in one year after the date of the judgment.—*Clark v. Morgan*, S. C. Neb., June 8, 1887; 33 N. W. Rep. 245.

208. RAILROADS—Contracts—Passes.—Where a railroad, in consideration of a conveyance of land, agrees to carry A and any of his children free of charge, B, one of the children has a right of action if he is refused free carriage. B is not obliged to apply for a pass, and, if the railroad does not issue passes, it must instruct its agents as to B's rights.—*Grimes v. Minneapolis, etc. R. Co.*, S. C. Minn., June 2, 1887; 33 N. W. Rep. 33.

209. RAILROADS—Counties—Cities—Bonds—Statutes.—Under the statutes of Kansas, cities of the third class can issue bonds in aid of railroads, although for other purposes connected with railroad aid they remain parts of the townships in which they are situated.—*Bard v. City of Augusta*, U. S. C. C. (Kan.), 1887; 30 Fed. Rep. 906.

209. RAILROADS—Municipal Aid—Taxation.—Laws N. Y. 1869, ch. 907; § 4, as amended by Laws 1871, ch. 383, providing that the county treasurer purchase bonds as a sinking fund for the redemption of the aid bonds from the taxes paid by any railroad in a town which has issued bonds in its aid, applies to all towns bonded in aid of railroads constructed in or through them.—*In re Clark v. Sheldon*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 341.

210. RAILROADS—Receiver—Original and Ancillary Actions—Jurisdiction—Personal Injuries.—Where an original bill to foreclose a mortgage against a railroad is filed in one State and ancillary bills in other States, the court in which the original bill was filed is the proper forum for an application to order a receiver to pay a debt. Demands for damages on account of per-

sonal injuries, inflicted before mortgage was made by servants of the railroad and for which it is regarded as responsible, are general debts of the corporation, and are not payable by the receiver out of the earnings of the road, nor out of the corpus of the property.—*Central, etc. Co. v. East Tennessee, etc. Co.*, U. S. C. C. (Ga.), Dec. 31, 1886; 30 Fed. Rep. 895.

211. RECEIVER—Appointment—Appeal.—Where a party is required to show cause for not assigning, and appeals therefrom, the appellate court, the lower court having had jurisdiction, will not in that manner review the action taken in appointing a receiver.—*Bagley v. Scudder*, S. C. Mich., May 5, 1887; 33 N. W. Rep. 47.

212. REMOVAL OF CAUSES—Federal Question—Taxation of Banks.—Where, in a suit, a question is raised whether shares of national banks are taxed as other property, the suit may be removed to the United States court, though the State has adopted the United States law on that subject.—*Richards v. Rock Rapids*, S. C. Iowa, June 18, 1887; 33 N. W. Rep. 372.

213. REMOVAL OF CAUSES—Practice—Time.—Construction of act of congress of March 3, 1887. Under that act the petition must be filed at the time when, by the practice of the State in its courts, the answer should be filed.—*Woolf v. Chasolm*, U. S. C. C. (N. Y.), May 27, 1887; 30 Fed. Rep. 881.

214. REVIVAL—Practice.—When the name of a deceased party has been stricken out of the record and eight years have elapsed, an application to revive the action as to that party will not be granted.—*Houth v. Owens*, U. S. C. C. (Ga.), April 6, 1887; 30 Fed. Rep. 910.

215. RIPARIAN RIGHTS—Des Moines River.—The Des Moines river having been declared a navigable stream by the act of congress of 1846, and having been meandered in the original government surveys, the repeal of the act in 1870 did not invest riparian owners with title to the middle of the stream.—*Steele v. Lanchez*, S. C. Iowa, June 18, 1887; 33 N. W. Rep. 366.

216. RIPARIAN RIGHTS—Navigable Streams.—A bayou in the Saginaw river from six to nine feet deep, the upper end of which is closed, which can be and has been used for purposes of navigation, is a navigable river, though it has no current.—*Turner v. Holland*, S. C. Mich., April 14, 1887; 33 N. W. Rep. 283.

217. SALE—Action for Price—Defense.—When, in an action for the price of goods, the defendant pleads that those furnished were of less value than what he contracted for, he must prove his allegations, and in failure thereof the jury cannot indulge in conjecture as to his loss.—*Moulton v. Baer*, S. C. Ga., Feb. 1, 1887; 2 S. E. Rep. 471.

218. SALE—False Representations—Rescission.—In an action to recover personal property sold on account of false representations as to the solvency of the maker of a promissory note which was accepted in payment, it is not necessary that such false representations should have been the sole cause inducing the plaintiff to take the note, nor is it material that the indorsers are responsible.—*Moline M. Co. v. Franklin*, S. C. Minn., June 15, 1887; 33 N. W. Rep. 323.

219. SEAMEN—Defective Tackle.—A ship and her owners are liable to seamen for injuries caused by the use of defective tackle.—*Sullivan v. The Neptune*, U. S. D. C. (N. Y.), April 4, 1887; 30 Fed. Rep. 925.

220. SEAMAN—Desertion.—If a seaman is lawfully on shore, and being detained as a witness by the civil authorities, and the ship sails without him, he is not guilty of desertion.—*Thorsberg v. The Lizzie M. Dunn*, U. S. D. C. (N. Y.), March 28, 1887; 30 Fed. Rep. 927.

221. SEDUCTION—Birth of Child—Presumption.—In a case of seduction, the ordinary period of gestation may be shown as a slight natural inference as to the time when the child was begotten.—*State v. Richards*, S. C. Iowa, June 15, 1887; 33 N. W. Rep. 342.

222. SHERIFF—Disbursements—Liability.—In the absence of other proof, the law will presume that money paid to the sheriff by order of the county com-

missioners for a certain purpose was so used.—*Mecosta Co. v. Vincent*, S. C. Mich., April 21, 1887; 33 N. W. Rep. 44.

223. SPECIFIC PERFORMANCE—When not Enforceable.—Complainant entered into a contract with four persons, only one of whom was in a position to perform his contract, and he assigned his business to his sons, another also assigned his to a third party: *Held*, that under the circumstances and changed relations of the parties specific performance could not be decreed.—*Pingle v. Conner*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 385.

224. SUBSCRIPTION—Railroad—Parol Evidence.—To an action on a railroad subscription, it is no defense to allege a parol agreement outside of that mentioned in the written agreement of subscription.—*Blair v. Butolph*, S. C. Iowa, June 16, 1887; 33 N. W. Rep. 349.

225. TAXATION—Corporate Stock—Overvaluation.—*Held*, that the object of Pub. Stat. Mass., ch. 13, § 64, was not to enable a corporation to bring before the supreme court the question whether there had been an overvaluation of stock, but whether there had been a wrongful assessment of tax upon that which was not a proper subject of taxation.—*Boston, etc. Co. v. Commonwealth*, S. J. C. Mass., June 29, 1887; 12 N. E. Rep. 362.

226. TAXATION—Deed to County—Notary Fees.—Notary fees are not a proper charge against a county for the acknowledgment of the county collector for land struck off for taxes to the territory.—*Henry v. County of Pima*, S. C. Ariz., July 3, 1887; 14 Pac. Rep. 290.

227. TAXATION—Sale—Certificate.—A certificate of sale of lands for taxes must be executed in a reasonable time thereafter. Such execution, years after, is of no effect.—*Giffilan v. Chatterton*, S. C. Minn., May 12, 1887; 33 N. W. Rep. 35.

228. TAXES—Appeal—Notice.—In taking an appeal to the circuit court from the division of a board of equalization of taxes, notice of appeal may be served within sixty days after the adjournment of the board.—*Richards v. Rock Rapids*, S. C. Iowa, June 18, 1887; 33 N. W. Rep. 372.

229. TENANTS IN COMMON—Wharf—Ouster.—A possession of an entire wharf belonging to tenants in common by one of them, amounts to an ouster of the others, since it is incapable of separate occupancy.—*Auncly v. DeSaussoere*, S. C. S. Car., April 20, 1887; 2 S. E. Rep. 490.

230. THREATENING LETTERS—Statute.—The statutory offense, in Texas, of "sending threatening letters" consists in knowingly and wilfully sending or delivering such letters.—*Castle v. State*, Tex. Ct. App., April 16, 1887; 4 S. W. Rep. 892.

231. TOWAGE—Unknown Rock.—A tug in a proper channel is not liable for injury to tow caused by contact with a rock theretofore unknown.—*Hooper v. The Mary N. Hogan*, U. S. D. C. (N. Y.), March 28, 1887; 30 Fed. Rep. 927.

232. TRESPASS—Strikes—Joint Action.—A party who leads a number of men to the premises of another, to see whether his employees will join a labor movement, is a trespasser as soon as he enters the premises, and is liable for their acts, though he halts them two hundred feet from the premises and tried to prevent them from doing any acts of violence.—*Webber v. Barry*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 289.

233. TROVER AND CONVERSION—Corporation Stock.—It is for the jury to determine the value of stock of a corporation wrongfully converted, and their action will not be reviewed if there is testimony to sustain it.—*Hitchcock v. McElrath*, S. C. Cal., June 21, 1887; 14 Pac. Rep. 305.

234. TRUST—Charitable—Validity.—A will directing the income of certain property to be distributed among the worthy poor of the city of La Salle in such manner as a court of chancery may direct, creates a valid charitable trust, and is not void for uncertainty in the beneficiaries.—*Hunt v. Fowler*, S. C. Ill., June 17, 1887; 12 N. E. Rep. 331.

235. TURNPIKES—Excessive Toll—Penal Action.—*Held*, that plaintiff cannot recover penalties provided by § 3636, How. Stat. Mich., for excessive toll charges when he paid such charges each time without objection and without informing defendant of the distance he had driven, of which the latter was ignorant.—*Fox v. Francher*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 416.

236. VENDOR—Bona Fide Purchaser—Mortgage.—Where a mortgage on land recites that it is given for part of the purchase money, and though the mortgagor has no deed therefor, yet a purchaser of the legal title from the mortgagee, with knowledge of the mortgage, take, subject to the rights of the owner of the mortgage.—*Clark v. Holland*, S. C. Iowa, June 16, 1887; 33 N. W. Rep. 350.

237. VENDOR AND VENDEE—Title Bond—Innocent Holder.—An innocent assignee for value of a title bond is not affected by the fact that the wife of the assignor was induced to sign the assignment by false representations of her husband.—*Rubelman v. Rummel*, S. C. Iowa, June 16, 1887; 33 N. W. Rep. 354.

238. VENDOR AND VENDEE—Rescission—Parol Evidence.—A sale of land will not be rescinded by a court on parol evidence of an agreement to that effect, unless such evidence is clear and indisputable. A vendor cannot, upon such grounds, recover the possession from the vendee who holds under a bond for a deed, if the latter tender the price and demand a deed.—*Davis v. Benedict*, Ky. Ct. App., May 21, 1887; 4 S. W. Rep. 338.

239. VENUE—Civil Action—Vendor and Vendee.—A vendee may bring an action to recover from his vendor damages for a deficit in quantity of the land sold in any county in which the defendant may be served with process. The action is transitory. Construction of Civil Code of Kentucky, § 78.—*Stamper v. Central, etc. Co.*, Ky. Ct. App., May 19, 1887; 4 S. W. Rep. 330.

240. WARRANTY—Breach—Notice.—Where a purchaser is required to notify the seller in writing in one day thereafter of the failure of the machine to work satisfactorily, the presence of the seller at the unsatisfactory trial thereof dispenses with such notice.—*Sandwich M. Co. v. Trindle*, S. C. Iowa, June 8, 1887; 33 N. W. Rep. 79.

241. WATER-COURSES—Dam—Liability.—Plaintiff allowed the refuse from his mill to fall into a stream and float into defendant's pond, where it interfered with the operation of defendant's grist mill. Defendant, to stop the refuse, fell trees into the stream on his land and caused the water to back up and interfere with plaintiff's saw mill. Plaintiff sued for damages: *Held*, the unlawful act of plaintiff having contributed to the injury, the court would not interfere to determine who was the more culpable, and that plaintiff could not recover.—*Davis v. Minnroe*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 408.

242. WILL—Devise—Construction—Life Estate.—A testator bequeathes certain lands to his daughter for her life, and after her death, to the begotten heirs or heiresses of her body, forever. The daughter and her husband conveyed the land. One of the two sons of the daughter quitclaimed to the purchaser, but the other sued for his share of the land: *Held*, that the law in this country recognizing no heirs tail the intention must govern, and the testator's words be construed as word of description, and that the daughter took a life estate.—*Leathers v. Gray*, S. C. N. Car., May 27, 1887; 2 S. E. Rep. 455.

243. WILL—Devise—Power of Sale—Remainder.—A testator bequeathed certain realty to his wife, with power to sell and convey, and also bequeathed certain personalty during her natural life, and at the death of my wife, all the property hereby devised or bequeathed to her, or so much thereof as may remain unexpended, to my two sons: *Held*, that the wife did not take a fee in the lands, but a life estate, with power to convey the fee, and convert the proceeds to her own use, with a remainder to the sons in the land if unsold, or if sold,

then in the unexpended proceeds thereof.—*Walker v. Pritchard*, S. C. Ill., June 17, 1887; 12 N. E. Rep. 336.

244. WILL—Life Estate—Contingent Remainder.—In a devise to a widow for life with remainder to be equally divided among the surviving children, the reference is to the children living at the death of the widow, and the remainders are contingent, and a levy and sale under execution of such remainder prior to its vesting conveys nothing.—*Roundtree v. Roundtree*, S. C. S. Car., April 19, 1887; 2 S. E. Rep. 474.

245. WILL—Probate—Presumptions.—Where a will was probated prior to January 1, 1856, by the testimony of one witness, it will be presumed that he testified that both witnesses subscribed it in the presence of the testator.—*Bedford v. Jenkins*, S. C. N. Car., May 21, 1887; 2 S. E. Rep. 522.

246. WILL—Sanity of Testator—Witness.—A witness, who knew the testator well, though not an expert, may, in Iowa, give his opinion as to the sanity of the testator after detailing the facts on which his opinion is founded.—*In re Norman*, S. C. Iowa, June 21, 1887; 33 N. W. Rep. 574.

247. WITNESS—Construction of Testimony.—The answer of a witness that he does not remember having made a certain statement, is not equivalent to a denial that he made same, nor is an answer "not in that language," or like words, equivalent to a denial.—*Meyer v. Stone*, S. C. Neb., June 9, 1887; 33 N. W. Rep. 420.

248. WITNESS—Credibility—Equity.—In an equity case, it is discretionary with the judge whether the doctrine *falsus in uno falsus in omnibus* shall be applied to the testimony of a witness.—*James v. Mickey*, S. C. S. Car., March 14, 1887; 2 S. E. Rep. 130.

249. WITNESS—Cross-examination—Bias.—It is always admissible to cross-examine a witness to prove bias or prejudice, and it is error to refuse to permit a question tending to that end. But if the direct evidence of the witness is of no value to the party producing it, the error is harmless.—*Teets v. Village of Middletown*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 347.

250. WITNESS—Cross-examination—Impeaching.—A witness in a murder trial can be cross-examined as to her various marriages and life to impeach her testimony.—*U. S. v. Wood*, S. C. Idaho, February Term, 1887; 33 N. W. Rep. 59.

QUERIES AND ANSWERS.*

QUERY No. 6.

Does a tax-deed, under the statutes of Nebraska, convey a good title? Or can the owner be deprived of his property by tax-sale under the Nebraska statutes? Please cite authorities. G.

QUERIES ANSWERED.

QUERY No. 28 [24 Cent. L. J. 511.]

In 1848, a father conveyed land to his three infant daughters, providing: 1. For his continuance of possession in trust for grantees, their heirs, etc., he to collect rents, etc., for their maintenance, etc. 2. That he might sell or exchange, holding consideration received for them, their heirs, etc. 3. That if he lived till they attained majority, he could partition among all, or give to any one her proportionate share; but their majority should not affect the trust, and he should not be compelled to partition. 4. Partition might be made after his death. In 1872, these daughters being of age and married, conveyed said land to their mother, with his knowledge and consent. He remains in possession. The mother died since in 1872, as also one of the daughters, the latter leaving several infant children. At the mother's death there were six other children, issue subsequent to deed of 1848; later, one of these, a married woman, died, leaving infant children. Three of said six died unmarried.

Survivors are the father, two of the *cestuis que trustent* under deed of 1848, infant children of the third, two married daughters of the six born after that deed, and an infant heir of the remaining married one of the said six. Query: What, under deed of 1848, did grantees take? What power of disposition of the land did that deed confer on the grantor, and in case he conveyed, was it necessary for *cestuis que trustent* to join him in the deed? What did the mother take under deed of 1872? Can a valid title be made now by the father alone, or would it be necessary to have the interest of the various infant heirs named, if they have any divested? W.

Answer. The father takes an estate adequate to the execution of the trust (1 Perry on Trusts, § 320), and his deed will be sustained under his fee and not under the power (*Idem*, § 316). His estate lasts till the complete execution of the trust (*Idem*, § 312), which, in this case, is till partition or his death. He can sell without joining the *cestuis que trust* (*Idem*, § 334). The daughters held only equitable estates (*Idem*, §§ 305, 313), which they could convey with the same effect as any similar conveyance by one holding the legal title (*Idem*, § 321). So the father holds the legal title and can convey the property by his single deed, and the heirs of the mother own the beneficial interest. E. W.

RECENT PUBLICATIONS.

A TREATISE ON THE POWER TO ENACT PASSAGE, VALIDITY AND ENFORCEMENT OF MUNICIPAL ORDINANCES, with Appendix of Forms and References to all the Decided Cases on the subject in the United States, England and Canada. By Norton T. Horr and Alton A. Bemis, of the Cleveland bar. Cincinnati: Robert Clarke & Co. 1887.

This is a work which, we think, will be found very useful to the large class of practitioners who may be engaged in cases involving the construction of municipal ordinances, the power of such corporations to enact them, and the methods of their enforcement. Considering the immense mass of property which throughout the country is invested in cities and towns, subject to municipal taxation and police regulations, it is highly desirable that there should be in the hands of the profession a practical work like this, in which the limitations upon the powers of the corporations, and the modes in which those powers are to be exercised, are treated with clearness and precision. It is very desirable that in large cities and towns which are abundantly supplied with official legal advisers that the profession should have in their hands a work which will enable them to meet those gentlemen upon equal terms and protect private interests against municipal invasion; and a portion of the same principle applies to minor municipalities (whose name in this country is "legion") which may, and frequently do, infringe private interests from mere ignorance.

And besides business interests and the all-pervading subject of municipal taxation, the health, safety, comfort and welfare of immense masses of our people are in a great degree involved in the question whether municipal powers are properly exercised, and it is therefore highly desirable in their interests that there should be in the hands of the profession a manual like the work before us, which sets forth so clearly the duties of municipal corporations in the enactment and enforcement of ordinances and the limitations upon their powers in these important respects.

The book is evidently the result of much study, is well written and well arranged, and we heartily commend it to the profession.